Petition

81-1997

Office - Supreme Court, U.S.
FILED
APR 26 1982
ALEXANDER L. STEVAS,
CLERK

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GASTON GERALD,

Petitioner,

vs.

UNITED STATES of America,

Respondent.

On Application for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES A. MC PHERSON
Attorney for Appellant
McPHERSON & ZAINEY
419 Carondelet Street
New Orleans, LA 70130
Telephone [504] 581-1973

THE ISSUES PRESENTED

Where a petitioner for relief pursuant to 28 U.S.C. §2255 files a petition claiming and sworn testimonial exhibits (viz., a State Court transcript of a hearing to determine whether use immunity had been granted the witness by the Federal prosecutors in petitioner's case) showing that the Government had expanded the previously disclosed terms of Federal transactional immunity accorded one of its key witnesses against petitioner, immediately before his testimony against petitioner in response to the witness' assertion of his Fifth Amendment privilege against self-incrimination, to protect that witness against use of his testimony against him in any subsequent State Court proceedings; the Government (not responding to an Order made pursuant to Rule 7[a] of the Federal Rules Governing §2255 Pro-

ceedings) filed an affidavit controverting petitioner's claims and the testimony of the witness' attorney in State Court, thus establishing a credibility issue between the witness' attorney and one of the prosecutors concerning the scope of the immunity granted the witness; in the transcript of the testimony of the witness' attorney in State Court, the attorney used the terms "total immunity" and "use immunity" interchangeably; and the District Judge ignored the testimony pertaining to "use immunity," did not request affidavits from other persons shown by the State Court transcript to have personal knowledge of the transactions (viz., the United States Attorney with whom the immunity negotiations had been conducted and the defense attorney who conducted those negotiations with the U. S. Attorney), and proceeded to determine that the Federal Gov-

ernment could not grant "total immunity" to the witness, hence petitioner's claim to the contrary could have no merit:

1. Did the Trial Court properly act to refuse an evidentiary hearing upon the basis of the Assistant United States Attorney's controverted affidavit that he had fully disclosed to petitioner's trial counsel the terms and extent of the immunity granted to the Government witness, Earl Day?

2. Did the Trial Court properly ignore the State Court testimony of the said witness' attorney, annexed as an exhibit to the petition for §2255 relief and thus required to be considered before summarily dismissing a petition pursuant to Rule 4(b) of the Federal Rules Governing §2255 Proceedings, that the witness had been granted "use immunity" and, so ignoring petitioner's claim and documentary exhibits,

could the Trial Court have properly decided this case upon the basis that the Government had no authority to grant "total" or "transactional" immunity, when the grant of "use immunity" had been pleaded and proved by the witness in the State Courts in order to suppress his own federal testimony and its derivative fruits and the grant of that type of immunity, in expansion of the originally disclosed Federal transactional immunity, and the nondisclosure thereof was the real issue of the motion to vacate the judgment of conviction pursuant to 28 U.S.C. §2255?

3. Whether petitioner is entitled to §2255 relief where the Government failed to comply with its obligation to disclose Giglio material and thus suppressed material impeachment evidence which would have affected the credibility of its key witness, Earl Day?

LIST OF INTERESTED PARTIES

Pursuant to Rule 21.1(b) of the Rules of this Honorable Court, petitioner states that he is the only interested party within the contemplation of the above cited rule.

I N D E X

The Issues Presented 1

List of Interested Parties v

Table of Authorities Cited vi

Opinions Below 2

Jurisdiction 3

Constitutional, Statutory and Rules Provisions Involved 5

Statement of the Case 6

Reasons for Allowing the Writ 31

Conclusion 65

Certificate of Service 67

Appendix F (Constitutional, Statutory and Rules Provisions Involved) A-1

Table of Authorities Cited

CASES:

Blackledge v. Allison, 431 U.S. 63 (1977) 44, 46, 50, 52

Brady v. Maryland, 373 U.S. 83 (1963) 61

Galpin v. Page, 18 Wall. [85 U.S.] 350 (1874) 42

Giglio v. U.S., 405 U.S. 150 (1972) 4, 14, 16, 30, 38, 54, 55, 61, 65

Glasser v. U.S., 315 U.S. 60 (1942) 11

Harris v. Nelson, 394 U.S. 286 (1969) 52

Holden v. Hardy, 169 U.S. 366 (1897) 42

Olmstead v. U.S., 277 U.S. 438 (1927) 34

Powell v. Alabama, 287 U.S. 45 (1932) 41, 53

Raines v. U.S., 523 F.2d 526 (4 Cir. 1970) 47

U.S. v. Agurs, 427 U.S. 97 (1976) 59, 60, 61

U.S. v. Hayman, 342 U.S. 205 (1952) 4

U.S. v. Mespoulede, 597 F.2d 329 (2 Cir. 1969) 12

Walters v. Harris, 460 F.2d 988 (4 Cir. 1972) 46

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS CITED:

U. S. Constitution:

Fourth Amendment 35

Fifth Amendment 5, 12, 23, 35, 41, 49

Sixth Amendment 35

Eighth Amendment 35

Fourteenth Amendment 35

U. S. Code:

18 U.S.C. §1623 29

18 U.S.C. §1623(d) 18

18 U.S.C. §1951 3, 39

18 U.S.C. §6001 et seq. 18, 16

28 U.S.C. §2101(c) 4

28 U.S.C. §2255 4, 5, 19, 20, 43

Supreme Court Rules:

Rule 33.3, S.Ct. Rules 5

Federal Rules of Civil Procedure:

Rule 56, F.R.C.P. 45, 46

Rule 56(c), F.R.C.P. 44, 45

Rule 56(e), F.R.C.P. 44

Rule 56(f), F.R.C.P. 44

Federal Rules Governing §2255 Proceedings:

Rule 4, §2255 Rules 43

Rule 5, §2255 Rules 43

Rule 6, §2255 Rules 43

Rule 7, §2255 Rules 20, 43, 45,47

Rule 8, §2255 Rules 43

Rule 11, §2255 Rules 4

MISCELLANEOUS SECONDARY AUTHORITIES
AND OTHER SOURCES CITED:

Petition for Writ of Certiorari,
U.S. v. Gerald, No. 80-1072 62, 63

WRIGHT, Chas. A., "Procedure for
Habeas Corpus," 77 F.R.D. 227
(1978) 4

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

_____

GASTON GERALD,

Petitioner,

vs.

UNITED STATES of America,

Respondent.

On Application for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The petitioner, Gaston Gerald, respectfully prays that a writ of certiorari issue to review the judgment and opin-

ion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on December 17, 1981.

OPINIONS BELOW

The Per Curiam of the Fifth Circuit Court of Appeals is unreported, officially or unofficially. See Table, 666 F.2d 590. A copy of that Per Curiam is marked "Appendix A" and annexed hereto at pages A-1 and A-2 of the Appendix to this petition.

The Fifth Circuit denied a timely petition for rehearing by a Per Curiam judgment which assigned no written reasons therefor. A copy of that Per Curiam is marked "Appendix B" and annexed hereto at pages A-3 and A-4 of the Appendix to this petition.

The Fifth Circuit adopted by reference the unreported opinion of the United States District Court for the Middle Dis-

trict of Louisiana, which opinion is marked "Appendix C" and annexed hereto at pages A-5 through A-16 of the Appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1981. It became final upon the denial by the Court below of a timely filed petition for rehearing on January 26, 1982.

This case originated in the United States District Court for the Middle District of Louisiana upon an indictment charging petitioner with conspiracy to violate the Hobbs Act, aiding and abetting a Hobbs Act extortion and three counts of perjury before a grand jury, in violation of 18 U.S.C. §§371, 1951 and 1623, respectively. The District Court had original trial jurisdiction of this case pursuant to 18 U.S.C. §3231.

After the verdict, during the pendency of the appellate proceedings in this cause, petitioner learned that the Government had violated his rights enunciated in Giglio v. United States, 405 U.S. 150 (1972), and he brought this action under 28 U.S.C. §2255. This is a quasi-criminal proceeding in which the rules governing civil appeals, and hence applications to this Honorable Court in civil cases are governed.* This petition will be timely if filed on or before April 26, 1982. 28 U.S.C. §2101(c).

---

* See Rule 11 of the Rules Governing §2255 Proceedings and the Advisory Committee Note thereto, citing United States v. Hayman, 342 U.S. 205 (1952), as authority that appeals in §2255 proceedings "are governed by the civil rules applicable to appeals from final judgments in habeas corpus actions." See, also, WRIGHT, Chas. A., "Procedure for Habeas Corpus," 77 F.R.D. 227, 249 (1978) and authorities collected in n. 94 thereof.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the United States Constitution; 28 U.S.C. §2255; and the Rules Governing §2255 Proceedings set forth in Title 28, U.S. Code, following 28 U.S.C. §2255. The text of the relevant portions of the above cited provisions of law are set forth in Appendix F, post, pp. A-1 et seq..†

† Appendices A-E accompanying this petition are set forth in a separate volume. Appendix F is not included in that Appendix volume because the Appendix was already printed when it was discovered that this petition, including the text of the relevant provisions of law, was overlength under the provisions of Rule 33.3 of the Rules of this Honorable Court.

STATEMENT OF THE CASE

State Senator Gaston Gerald was convicted of aiding and abetting the attempted extortion of Charles Carter & Co., Inc., through Robert Carter, of money to cause the East Baton Rouge Parish City-Parish Council to waive an assessment of liquidated damages pursuant to a contract providing therefor in the event of late completion of several buildings in a complex of such buildings located in Baton Rouge, Louisiana.[1] On the direct appeal, the petitioner raised the issue of the insufficiency of the evidence to prove guilt beyond a reasonable doubt of the allegation that he aided and abetted Jack

1. That judgment was affirmed by the Fifth Circuit Court of Appeals on August 25, 1980, 624 F.2d 1291, reh. den., 629 F.2d 1350, and a writ of certiorari was denied on February 23, 1981, 101 S.Ct. 1364.

Menzie[2] to attempt to extort the said company of $25,000. In response to petitioner's argument in the Court below, the Fifth Circuit wrote (624 F.2d at 1294):

> * * * Menzie and appellant Gerald met and agreed to pick up Lacy's earlier "deal". Menzie informed Carter that Lacy could not be trusted and that he, Menzie, had an "acquaintance" who could procure a favorable Council vote for the same figure, $25,000. Carter agreed and gave Menzie $15,000 in earnest money for transmittal to the acquaintance. The money was to be returned if a favorable vote was not obtained. Menzie delivered the money directly to appellant. Sometime between the first Council vote and the second Council vote Gerald persuaded one Council member to change his vote to Carter's favor. But another member of the Council changed his former favorable vote causing the vote to deadlock for

2. Jack Menzie is an alleged accomplice who testified favorably to the Government's case upon a grant of immunity. Although he was the moving force in the alleged offense and actually performed all of the overt acts of extortion against Robert Carter, he was immunized in exchange for testimony against the petitioner, a more desirable target of prosecution.

> the second time at the January 25 meeting. (Emphasis added.)

The Court below also made reference to a tape-recorded conversation between petitioner and Robert Carter at lunch one day after Menzie had been given the $15,000 for his "acquaintance" to "fix" the Council vote. The Court below noted (624 F.2d at 1294):

> Carter informed Gerald that he had given $15,000 to Menzie for the acquaintance to fix the Council vote but Menzie had not informed him of the identity of the acquaintance. Gerald replied: that he had done everything he could to help by talking with the mayor, a councilman and several others; that Carter should go "all out" to get the assessment waived at the next Council meeting; and that Menzie could be trusted. Gerald intimated that some members of the Council were seeking $75,000 for a favorable vote and that therefore the $25,000 deal proposed by Menzie and acquaintance was a bargain.
>
> Nevertheless at the February 8, 1978 meeting the Council voted to assess the full $137,000 in late charges. Pursuant to the money back guarantee Menzie retrieved the $15,000 from Gerald and returned it to Carter.

And finally, the Court set forth a partial transcript of a conversation between Menzie and petitioner which was tape-recorded by Menzie after he had begun to cooperate and as a part of his cooperation with the Government in its effort to get petitioner, a political figure which would have represented a larger plume in the prosecutor's bonnet. That partial transcript was set forth at 624 F.2d 1294-95. It related to an effort by Senator Gerald to ascertain what Menzie had told the grand jury so Senator Gerald would not tell an inconsistent story.

The petitioner conceded that he had been given an envelope by Menzie containing money and that he had given it back to Menzie before the unfavorable vote by the Council. The jury believed that testimony and acquitted petitioner of Count IV charging him with perjury when he had so in-

formed the grand jury. Petitioner also conceded he had spoken with Robert Carter and told him he (petitioner) had spoken on his behalf with various officials who could influence the vote in his favor. Petitioner testified that those efforts were not made pursuant to any deal with Menzie or in expectation of any part of the money, but solely for the purpose of helping Carter's company so that he could pay off the subcontractors he still owed money from the job at issue then. The F.B.I. had participated in the preparation of the envelope of money which was given to Menzie by Carter. It had made xerox copies of each of the bills and had made a list of the bills in the order in which they were placed in the envelope. At trial, petitioner demonstrated that each of the bills listed by the F.B.I. was still in the envelope in the same order they had

originally been, thus proving the petitioner had not removed any of the money to make payoffs to anyone on the City-Parish Council or for himself. Petitioner had been charged in Count III with perjury because of his answer before the grand jury that he was not to receive any of the money. The jury obviously believed that testimony and its necessary correlative, that petitioner had spoken with the various officials without expectation of personal gain, for it acquitted petitioner of that false charge. Nothing in the luncheon conversation with Carter, when construed in the light most favorable to the verdicts on the perjury charge[3] supports the

---

3. The rule of Glasser v. United States, 315 U.S. 60 (1942), requires that evidence be viewed in the light most favorable to the Government when considering its legal sufficiency to support a verdict of the jury favorable to the Government. That rule creates a presump-

verdict on Count II--the aiding and abetting attempted extortion charge.

The only source of testimony that petitioner "persuaded one Council member to change his vote," upon which the Court of Appeals relied for its finding that the evidence was sufficient to sustain the conviction of petitioner on the lone count of aiding and abetting the attempted extortion of Charles Carter & Co., Inc., was

---

tion in favor of the prevailing party that the jury has properly analyzed the evidence and made its assessment of credibility in reaching its verdict. Where, as here, the defendant prevails on separate charges which preclude the assumption that a particular fact was concluded against him by the jury's general verdict, when its specific verdict on the precise fact at issue is in favor of the defendant, the appellate courts should be bound by the rule of Glasser to view that particular fact in the light most favorable to the jury's verdict for acquittal. Cf. U.S. v. Mespoulede, 597 F.2d 329 (2 Cir. 1969)(Pt. III). Otherwise, the Government is given unfair advantage on appeal and the defense is relegated to less than equal justice in violation of the Fifth Amendment to the Constitution.

Earl Day, the said Councilman. There were records reflecting his change of vote from unfavorable to favorable to Carter, but those records did not indicate the nature of the cause for such a change of vote. Only Day's testimony attributed the change of his vote to petitioner's effort. As the Court of Appeals noted, another Council member's vote changed from favorable to unfavorable, thus maintaining the deadlock. The Court of Appeals' reference was to changes of votes from unfavorable to favorable to Charles Carter & Co., Inc.; hence, its statement that the evidence of petitioner's persuasion of one Councilman to vote favorable to Carter could not have related to that change of vote and could only have related to the change of Day's vote.

Because Day was the sole source of the testimony that petitioner caused him

to change his vote,[4] the credibility of Earl Day was crucial to the Government's case and to the jury's assessment of the evidence in its quest to determine, under the reasonable doubt standard, whether petitioner had aided and abetted Menzie's attempt to extort Carter.

The "Automatic Discovery Order" of the United States District Court for the Middle District of Louisiana requires the Government to furnish to the defense all matter subject to disclosure under this Court's decision in Giglio v. United States, 405 U.S. 150 (1972). The Government responded with regard to Earl Day, in paragraph 4 of its "Automatic Discovery Letter" written in compliance with the said Order:

---

4. See Appendix D, pp. A-23 through A-30, A-34.

> It has been agreed by the Government, Earl Day and his attorneys that if Day re-appeared and testified truthfully before the grand jury, and at trial, that the Government would not seek perjury charges against Day arising from his initial appearance before the grand jury, and would agree not to seek any substantive charges against Earl Day on matters arising from the assessment of liquidated damages to Carter and Company, Inc. (R. 220) (Emphasis added.)

That letter did not disclose the grant of any "use immunity" to the witness which would be enforceable in State court upon possible malfeasance, public bribery or any other State charges. The Government did not supplement that required disclosure prior to the cross-examination of the witness, Earl Day.[5] The Automatic Discovery Order of the Middle District of

5. The entire testimony of Earl Day at petitioner's trial is set forth in Appendix D, pp. A-17 through A-37. The Appendix contains a bold-character bracketed reference to the commencement of each page of the trial transcript.

Louisiana imposes a continuing obligation upon the part of Government attorneys to disclose Giglio material.

Following the trial of this cause, based upon Day's own testimony and the testimony of witnesses disclosed by his testimony, charges were brought against Earl Day by the District Attorney for the Parish of East Baton Rouge in the Nineteenth Judicial District Court of the State of Louisiana. For the first time, evidence surfaced that immediately before Day testified against petitioner he was granted informal use immunity so that his trial testimony and its derivative fruits could not be used against him in any other proceedings--including the State charges in which this evidence first came to light. In the State Court proceedings against Day, he was represented by two attorneys, Messrs. Robert Forrest and Richard Olsen, the lat-

ter of whom was a former Assistant United States Attorney and recognized as an expert in the area of law dealing with immunity for Government witnesses. Mr. Forrest retained Mr. Olsen to assist him to represent Day expressly because of this area of expertise. Appendix E, p. A-56.[6] Mr. Forrest testified that he and Mr. Olsen repeatedly asked for "use immunity" for Day as a condition precedent to Day testifying at petitioner's trial. Appendix E, pp. A-50, A-51. Despite the representations about the terms of agreement in the Automatic Discovery Letter, counsel for Day testified that Day appeared a second time before the grand ju-

6. The relevant testimony in the State Court proceedings against Earl Day is set forth in Appendix E to this petition, pp. A-38 through A-65. That transcript was annexed as Exhibit B to petitioner's application for relief pursuant to 28 U.S.C. §2255.

ry pursuant to an offer made by the United States Attorney in avoidance of a perjury charge against Day pursuant to the recantation provisions of 18 U.S.C. §1623(d) and a suggestion that immunity could be obtained, but that on the eve of petitioner's trial, in fact minutes before Day appeared as a witness, he had not been accorded any immunity[7] except from the perjury charges by virtue of his recantation appearance. Formal immunity pursuant to 18 U.S.C. §6001 et seq. was not deemed necessary for Day by his counsel upon assurances by Mr. Don Beckner, the United States Attorney, that "he'd always put it in the record if we wanted him to." Appendix E, p. A-57.

---

7. Appendix E, post, pp. A39, A-40-41, A-44-45, A-50-51, A-52, A-53-54, A-56.

Upon the revelation of the claims for immunity by Day which exceeded the scope of the disclosures made by the Government in its Automatic Discovery Letter and its direct examination of Day on the issue of immunity, Appendix D, pp. A-18 and A-19, defense counsel moved for a new tri- al pursuant to 28 U.S.C. §2255. Annexed to the petition were the transcript of the testimony of Mr. Robert Forrest, Esq., in the State Court proceedings and the af- fidavit of undersigned counsel that he was not made aware of the grant of immunity to Day immediately before trial. The Govern- ment responded to the application pursuant to an Order of the District Court, which provided:

> Counsel for defendant having filed a motion to vacate the sentence and/or for a new trial pursuant to the provisions of 28 U.S.C. §2255:
>
> IT IS ORDERED that the United States of America, through the United States Attorney for the Middle

> District of Louisiana, respond to the motion, supporting data, and brief filed by the defendant within twenty (20) days from date hereof, and that copies of the response be served by mail upon counsel for the defendant.

There was no order made, pursuant to §2255 Rule 7,[8] directing the expansion of the record. The Assistant United States Attorney filed an affidavit with his response to petitioner's motion and memorandum in which he stated:

> 5. He wrote and signed the letter dated January 10, 1979, a copy of which is attached as Exhibit A to the Government's Opposition to the New Trial Motion.
>
> 6. This letter, described in paragraph 5 above, completely discloses the agreement made between the Government and Earl Day.
>
> 7. Shortly before Day testified at Gerald's trial, the agreement previously made between the Government and Earl Day (which had previously been disclosed to the defendant) was reconfirmed.

---

8. Rules Governing §2255 Proceedings are cited herein as "§2255 Rule ___."

> 8. The confirmation to Day and his attorney as referred to in paragraph 7 above in no way changed or expanded the agreement between Day and the Government that had previously been disclosed to the defendant.

That affidavit was made in response to petitioner's claim, made in the motion, supported by the testimony of Robert Forrest, Esq., which was appended to the motion as Exhibit B, and the memorandum submitted by petitioner to the district court that the Government, immediately prior to Earl Day's testimony against petitioner, expanded the immunity granted the witness beyond the terms of the letter furnished defense counsel concerning the agreement with Earl Day to "use immunity" which put that witness on a par with Jack Menzie, whose uncorroborated testimony against petitioner was rejected by the jury as demonstrated by the verdicts in Counts I, III, IV and V at the trial of

this cause.

The District Judge found with regard to petitioner's allegations (Appendix C, pp. A-9 through A-11):

> Defendant also contends that immediately before testifying at the trial, the Government extended the immunity from prosecution to cover State Court prosecutions as well as immunity from Federal prosecution. Not only is there no evidence of such a promise, but there is evidence that no such promise was made. The United States Attorney has executed and filed a sworn affidavit stating that no such extended immunity was provided and, as pointed out by the United States Attorney, and as is well known to defense counsel, neither the United States Attorney nor the United States District Court would have any authority to grant a prospective witness immunity from State prosecution for violation of a State law. Since there is no question but that defense counsel knew of the immunity which had been granted insofar as Federal prosecution is concerned, and since defense counsel did in fact make reference to this immunity while cross-examining Mr. Day and while arguing to the jury, there was certainly nothing to prevent counsel for the defendant from pursuing the immunity question to his heart's content during the cross-examination of Mr. Day had he elected to do so. He knew an immunity had been granted, and he had Mr.

> Day under cross-examination. He questioned him about the immunity, and he could have questioned him further had he wished to do so. He cannot now claim that his client was unduly prejudiced by this grant of immunity.

With regard to the allegations that the agreement which was allegedly reconfirmed immediately before[9] Day's testimony changed the terms of the agreement, the District Judge found, without a hearing and contrary to the transcript of testimony adduced in the State Court proceedings (Appendix C, post, pp. A-11 through A-12):

> As a result of this grant of immunity, Earl Day did reappear before the grand jury, and he did appear and testify as a witness for the Govern-

---

9. Councilman Day asserted his Fifth Amendment privilege against compulsory self-incrimination when he was initially called at trial to testify against petitioner. After a recess in which the Government counsel had a discussion, Government counsel met with the witness and his counsel, after which Day testified. In the State Court proceedings, Day's attorney

ment at the trial of the case. Defendant now says that since the letter "* * * did not state that Earl Day was given immunity and it did not name or indicate to defense counsel the existence of any substantive charges in connection with the Carter case which could have been brought against Earl Day * * *", defense counsel did not consider the letter to mean that immunity had been granted, but rather considered it "* * * to have been nothing more than a catch-all agreement made to satisfy Councilman Day's or his counsel's concern about unanticipated areas of exposure to criminal liability."

This argument is specious.

The letter speaks for itself, and clearly indicates and affirms that a grant of immunity had been given to Earl Day in return for truthful testimony before the grand jury and at the trial of the case.

Not only is the letter clear as to the grant of immunity, but counsel for the defendant well knew what the letter said and meant. During cross-

---

testified that he had been seeking "use" and "derivative use" immunity for Day and that such immunity was extended to Day for the first time when the Government did so immediately before Day testified against petitioner.

> examination of Mr. Day, counsel for defendant questioned him about the fact that he had been assured that he would not be charged with making false declarations if he would now tell the truth to the grand jury and at the trial. Defense counsel also in his argument to the jury reminded the jury of the promised immunity when he referred to the "private little deal" that Earl Day had worked out with the United States Attorney.

Nowhere in the Automatic Discovery Letter is there any reference made to the grant of "use" immunity to Earl Day which would have been good in State Court to prevent the use against him of his own testimony or its derivative fruits. The agreement not to "seek" any substantive charges, especially when compared with the use of the same word in the same paragraph with regard to the agreement not to "seek" a perjury indictment--which could have been sought only before a Federal grand jury since the Federal grand jury testimony furnished no jurisdictional basis for

State prosecution--, was obviously applicable only to Federal charges. The District Court held, in justification for its conclusion that Day had been granted no immunity which would affect the subsequent State charges against Day, that the Federal Government "obviously" had no authority to grant transactional immunity which would prevent a State prosecution. See Appendix C, post, p. A-13. "Obviously," the Federal Government does have authority to grant "use immunity" which would prevent the use in State Court of a Federal witness' own testimony or its derivative fruits.[10]

In the State Court proceedings, coun-

10. See, e.g., 18 USC §6001 et seq. There is ample authority that the Federal prosecutors may grant "informal" use immunity to its witnesses as well as promising them immunity from prosecution for any offenses they agree not to prosecute in exchange for testimony.

sel for Earl Day testified that the conversations regarding "use immunity" had been conducted with Don Beckner, the United States Attorney for the Middle District of Louisiana, not C. Michael Hill, his Assistant. Counsel for Day indicated that Mr. Beckner had expressed a willingness to put the terms of Day's immunity on the record. The Assistant District Attorney, Mr. Sinquefield, indicated to the State Court that he had requested that Mr. Beckner testify in the State proceedings about the terms of the immunity granted to Earl Day, but that Mr. Beckner had declined to do so under the authority of a Federal regulation which prohibited him from being subpoenaed by a State Court to testify about the performance of his duties as a Federal prosecutor. Also, Mr. Richard Olsen, a former Assistant United States Attorney who had been retained by Day's counsel as

an expert in Federal criminal procedure, including witness immunity, was not examined in State Court but merely conducted the direct examination of Mr. Forrest. According to Mr. Forrest's testimony in the State Court proceedings on behalf of Day, it was Beckner and Olsen who discussed the grant of use immunity to Day as a precondition to his testimony and Mr. Hill's declaration that Day had immunity immediately before Day testified was a grant of "use immunity" by Mr. Beckner through Mr. Hill and not simply a confirmation by Mr. Hill of a pre-existing promise equivalent to that reflected in ¶4 of the Automatic Discovery Letter. According to the testimony in the State Court proceedings, the only agreement that had been reached between Day, his attorneys and the Government at the time of the confection of the Automatic Discovery Letter was that

Day would be permitted to appear and recant in avoidance of a prosecution under 18 U.S.C. §1623 and that it was possible that Day could be granted immunity of some then undisclosed nature. What was "obvious" is the Government did not want to give Earl Day "use immunity" and refrained from doing so until the moment of decision when it became necessary either to do so or to forego his testimony pursuant to a claim of privilege by the witness. The Government granted the witness "use immunity," which protected him against the use in State Court of his testimony given at petitioner's trial, and did not inform the defense that it had granted "use immunity" to the witness. This was an expansion over the previously disclosed promise not to prosecute the witness in Federal Court for the events about which he testified. Defense counsel did not inquire about the

witness' "use immunity" in State Court because that had not been disclosed to counsel. Counsel relied upon the Government's non-disclosure as information to the effect that no such immunity had been granted. It was the Government's obligation under the Automatic Discovery Order of the District Court to disclose Giglio information and that obligation was of a "continuing" nature. The non-disclosure worked to deter defense counsel from asking the appropriate line of questions to bring out the true nature of the Government's "deal" with Earl Day.[11]

---

11. Asking the witness about an agreement for use immunity which would have been effective in State Court, accompanied by the denial by the witness that such an arrangement existed, would not have served the petitioner's interests on cross-examination. The requirement of disclosure of Giglio information pursuant to the Automatic Discovery Order of the District Court is to require the Government to furnish all necessary information to enable the defen-

REASONS FOR ALLOWING THE WRIT

Not the least significant reason why this Honorable Court should grant a writ of certiorari in this case is that it would do justice to do so. We recognize, with all due respect, that this Court's view of its role is to resolve conflicts among circuits and to set the legal philosophy of this nation, leaving it to the lower courts to dispense basic justice. Sometimes, however, even the finest machines malfunction, either because of failure of the line workers to perform routine maintenance jobs or because the worker's

---

dant to properly interrogate adverse witnesses. The defense, since the Order imposes a continuing duty upon the Government, should be entitled to rely upon the fact of non-disclosure as a negative assertion that such information exists. That was what counsel did in the Trial Court and he did so upon the negative assumption from the prosecution's non-disclosure to the contrary.

concept of management policy has misled the worker to believe that the performance of maintenance is less beneficial to the company than is production. "Justice" is the oil by which our judicial machinery is lubricated, and a just result is its supposed final product.

Because of the reversal of recent judicial philosophy--which some of us on the line have come to regard as being necessary to the constitutional philosophy on which this Nation was founded, viz., the protection of the individual from the excesses of Government--, we believe that the lower courts have received the signal from this Court, correctly or not, that the constitutional restraints upon Government have been lessened and it is somehow just and proper, so long as blame for an unjust conviction can be put upon a jury's determination of guilt, to sanction depar-

tures from due process in the "War on Crime." While the conduct of criminals constitutes a major conflict with Society, the "War on Crime" is not a foreign invasion in which to apply the "Rules of War" which suspend constitutional restraints upon official lawlessness under the concept that "the ends justify the means." The Founding Fathers recognized the need for law enforcement, yet, because of their experience with abuses of power by the English Government which had commenced unfair trial tactics and otherwise rescinded the freedoms to the Colonial people which were a matter of right in England, set forth limits upon the exercise of power by our Government in pursuance of the objective of law enforcement. Under the Constitution, the ends may be accomplished only by means which are not prohibited. If public confidence in the law is to be maintained

--or restored (depending upon one's own view)--, then adherence to the law in the course of its enforcement is fundamental.[12] Every war has its casual-

12. As Mr. Justice BRANDEIS warned in Olmstead v. United States, 277 U.S. 438, 485 (1927) (dissenting):

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Any addition to these venerable and immortal words must necessarily pale in view of their light. Mr. Justice BRANDEIS, in Olmstead, spoke of the breaking of a mere State criminal statute by a person employed by the Government

ties, many of whom are mere innocent bystanders. We submit that Senator Gerald was the victim, not of the War on Crime but of the War on Politicians accused[13] of crime. The concept of justice embodied in the Constitution, especially in its Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, was there enshrined in the Bill of Rights in order to reduce the casualties of false accusation, unfair tri-

---

to do so. The Constitution is the organic law from which our government derives its power and authority to deal with citizens to deprive their lives, liberty and property. A violation of the organic law by those charged with enforcement of the law has much more serious consequences for the respect for law and the due administration of justice than does the violation by a citizen of mere statutory law.

13. The mentality that spawned ABSCAM and BRILAB consumed the overzealous Federal prosecutors in this case who were so willing to "get" the petitioner that they gave immunity to their guilty witnesses and then concealed that from the petitioner and from the jury. In this regard, it is noteworthy that the Government

als and governmental overreaching. The role of this Court is not, as often misconceived even by its own composition, to disregard injustice until it either becomes so rampant or the concept of justice becomes so confused that it calls for an exercise by this Court of its power of supervision. As managers of the judicial machinery of this Nation, the role of this Court is to establish the controls to be used not only to keep the judicial machinery functioning (maintenance control) but

---

granted complete immunity to the actual extortionist and brought three false charges of perjury and a false charge of conspiracy to extort against petitioner, all because, we believe, he was a prominent State politician in whom the People reposed confidence. Significantly, after his conviction and five-year sentence (much to the dismay of the prosecutors, the district judge and his political opponents), Senator Gerald was re-elected by his constituents who knew his character and obviously placed no stock in the validity of the verdict in the instant case.

to assure that the product is and does what is represented about it (quality control). When a product is simple merchandise, we expect the retailer or manufacturer to either refund our money or give us a product which conforms to its advertised representations. We should not expect less when the product is justice. When a machine breaks down and the quality of the product suffers, the stockholders expect management to correct the problem and restore production of quality items. As a stockholder in this Nation, every citizen's primary dividend is the assurance that when brought into dispute with the Government he will be dealt with justly. In this context, every citizen, for his own protection, expects this Court to pitch in and get its hands oily when the judicial machinery is not producing "justice. When justice has failed, it is this

Court's responsibility to tune up the judicial machinery (there are no mechanics to repair broken justice), to see that the product of justice is delivered to the People, and to see that the representations made in the constitutional warranty will be honored in every case.

The conviction of Louisiana Senator Gaston Gerald was unjust, not only for all the reasons set forth in the Petition for a Writ of Certiorari in Case No. 80-1072 of the Docket of this Honorable Court, which was denied, but for the additional reason that the Government withheld from the defense, contrary to the obligation of due process enunciated in Giglio v. United States, 405 U.S. 150 (1972) and the standing "Automatic Discovery Order" of the district court, material information which would have affected the credibility of the Government's key witness,

Earl Day, who testified that petitioner persuaded him to change his vote at the City-Parish Council meeting--the only clearly inculpatory act which allegedly occurred after the other key witness, Jack Menzie, delivered to petitioner a sealed envelope containing $15,000 which Menzie obtained from the alleged extortion victim[14] as earnest money to secure favorable action by the Council. The evidence clearly showed that petitioner had not opened the sealed envelope, which he returned to Menzie before the unfavorable vote (as the jury found, contrary to the decision of the Court of Appeals on the di-

14. We still submit the alleged victim attempted to obtain an illegal gain by attempting to bribe public officials to vote to waive the liquidated damages which were forfeit under the terms of the contract, rather than a fear of economic loss, 18 USC §1951, of that he had already forfeited by virtue of noncompliance with the terms of the contract.

rect appeal[15]). The jury acquitted petitioner of every uncorroborated charge of perjury based upon a conflict between the grand jury testimony of petitioner and Menzie. The testimony of Earl Day corroborated Menzie's testimony that petitioner, pursuant to the alleged scheme, spoke to unnamed members of the Council to persuade them to vote favorably to Charles Carter & Co., Inc., to waive the liquidated damages imposed by the contract. In that regard, Earl Day's testimony was more important to the Government's case than was Jack Menzie's testimony which, without corroboration, was insufficient for the jury to find guilt beyond a reasonable doubt.

15. 624 F.2d 1291, 1294: "Pursuant to the money back guarantee Menzie retrieved the $15,000 from Gerald and returned it to Carter."

1. **The District Court failed to provide petitioner an adequate opportunity to prove his claim and disregarded the actual claim of petitioner, redefined the issue presented by petitioner, and, in light of the issue as defined by the Trial Court, held against the petitioner. The Court of Appeals, by affirming the judgment of the district court and adopting its findings of fact and conclusions of law, has sanctioned such a departure from the accepted and usual course of judicial proceedings in this Nation as to call for an exercise by this Court of its power of supervision.**

It is clear that due process requirements under the Fifth Amendment to the Constitution mandate that petitioner's claim be heard by the District Court and that it be heard upon the issues presented by petitioner therein. In Powell v. Alabama, 287 U.S. 45, 68 (1932), this Court said:

> It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional require-

> ment of due process of law. The words of Webster, so often quoted, that by "the law of the land" is intended "a law which hears before it condemns," have been repeated in varying forms of expression in a multitude of decisions. In Holden v. Hardy, 169 U.S. 366, 389 [(1897)], the necessity of due notice and an opportunity of being heard is described as among the "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." And Mr. Justice Field, in an earlier case, Galpin v. Page, 18 Wall. [85 U.S.] 350, 368 [(1874)], said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. "Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered." Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so.

To the foregoing, we might add that judgment upon grounds irrelevant to the cause of action "wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never

be upheld where justice is justly administered."

The Rules Governing §2255 Proceedings, particularly Rules 4(b), 5, 6, 7 and 8, favor disposition of motions brought pursuant to 28 U.S.C. §2255 without an evidentiary hearing where the "files, records, transcripts, and correspondence relating to the judgment,"[16] the "motion and any annexed exhibits,"[17] the answer,[18] and any expansion of the record "directed" by the district court[19] show the movant not to be

16. Rule 4(b), §2255 Rules.

17. Ibid.

18. Rules 4(b) and 5, §2255 Rules.

19. Rule 7(a), §2255 Rules, authorizes the district court to "direct" the expansion of the record but it does not make provision for a party, on its own election, to presume to do so without the authority of the district judge.

entitled to the relief sought. Blackledge v. Allison, 431 U.S. 63, 80 (1977). In Blackledge, this Court referred to the summary judgment procedure set forth in Rule 56(e)(f), F.R.C.P., as a procedure to be utilized in post-conviction proceedings brought pursuant to §2255 "to test whether facially adequate allegations have sufficient basis in fact to warrant plenary presentation of evidence." A case may not be disposed of on a motion for a summary judgment, however, if there is a genuine issue of fact on a material issue. Rule 56(c), F.R.C.P. Summary dismissal of a §2255 motion may be made upon pleadings which establish a prima facie case only when those allegations, considering the entire record of the case, are "palpably incredible or patently frivolous." Blackledge, supra, 431 U.S., at 76, 78. When there has been no order by the dis-

trict court to expand the record pursuant to Rule 7(a), §2255 Rules, which makes provision in other subsections of the Rule for notice to the movant and an opportunity to respond,[20] and no motion for a

---

20. In the instant case, the Government filed an affidavit contradicting the transcript of the testimony of Earl Day's attorney in the State Court proceedings in which he proved the Government had given Day "use immunity" which precluded the State of Louisiana from adducing against him the testimony he had given in the Federal trial of petitioner. This affidavit was served upon petitioner's counsel, but no notice was given that same was done in contemplation of an expansion of the record pursuant to Rule 7(b), §2255 Rules, and petitioner was given no opportunity to obtain other affidavits of witnesses having knowledge of the matter, e.g., the United States Attorney with whom the immunity negotiations were conducted and Mr. Richard Olsen, Esq., who conducted the negotiations on behalf of Earl Day with Mr. Beckner, the United States Attorney for the Middle District of Louisiana. The District Judge merely summoned counsel to his Chambers and handed them a copy of the Order being entered in these proceedings a few days after the Government responded to petitioner's motion. In the absence of such notice [implicit in Rule 7(a)'s reference to a direction by the Court that the record be expanded and in Rule 56, F.R.C.P.'s requirement of at least 10

summary judgment has been made pursuant to Rule 56, F.R.C.P., the Government may not defeat a facially adequate petition by filing an affidavit disputing sworn testimony annexed to the petition as an exhibit. This Court, in Blackledge v. Allison, supra, 431 U.S. at 82 n. 25, said:

> * * * before dismissing facially adequate allegations short of an evidentiary hearing, ordinarily a district judge should seek as a minimum to obtain affidavits from all persons likely to have firsthand knowledge of the existence of [the facts relevant to the issues raised]. See Walters v. Harris, 460 F.2d [988], at 992 [(4 Cir. 1972)]. "'When the issue is one of credibility, resolu-

---

days within which to respond to affidavits filed by one's opponent in support of a motion for a summary judgment], it was assumed that the affidavit of the prosecutor only created a credibility issue which must be resolved at an evidentiary hearing. As will be noted from a reading of the District Court's Findings of Fact and Conclusions of Law, Appendix C, p. A-10, the prosecutor's affidavit was not so regarded but was taken as proof that the grant of "use immunity" had not occurred.

> tion on the basis of affidavits can rarely be conclusive, but that is not to say they may not be helpful.'" Advisory Committee Note to Rule 7, Rules Governing Habeas Corpus Cases, 28 U.S.C., p. 269 (1976 ed.), quoting Raines v. United States, 423 F.2d 526, 530 (4 Cir. [1970]).

The testimony of Mr. Robert Forrest, Esq., Appendix E, pp. A-38 et seq., shows that Earl Day was granted "use immunity" by the Government immediately before Earl Day testified. The affidavit of the Assistant United States Attorney who assisted the United States Attorney to conduct the prosecution of petitioner states that he "reconfirmed" the grant of immunity given to Earl Day immediately before his testimony, but further states that the alleged reconfirmation did not expand the immunity beyond the form disclosed to defense counsel pursuant to ¶4 of the Automatic Discovery Letter. Significantly, allowing Earl Day to reappear before the

grand jury and recant his original grand jury testimony foreclosed prosecution for perjury before the grand jury. 18 U.S.C. §1623(d). The balance of the grant of immunity disclosed in ¶4 of the Automatic Discovery Letter was a grant of transactional immunity from federal prosecution. It did not relate any grant of "use immunity" applicable to bar the use of Earl Day's testimony against him in State criminal proceedings. Mr. Forrest's testimony, adduced in the State proceedings and annexed as an exhibit to petitioner's motion in the District Court, showed that Earl Day's lawyers had dealt with the United States Attorney, Don Beckner,[21] for

21. According to the testimony of Day's attorney, Robert Forrest, Mr. Beckner stated to him that he would put the grant of immunity upon the record at any time that was necessary for the protection of Day's rights under the agreement. That would have been unnecessary with

"use immunity" and that, after Day asserted his Fifth Amendment privilege not to testify at petitioner's trial, Mr. Hill, the Assistant United States Attorney who made the affidavit in these proceedings,

---

regard to only federal transactional immunity because it was already in the record in ¶4 of the Automatic Discovery Letter filed in petitioner's case. Especially in view of the fact the United States Attorney had the power to control the indictment of persons within his jurisdiction, hence he could have either informed a grand jury of the agreement or not submitted such a case to the grand jury for its consideration, it is obvious that the offer of Mr. Beckner to put the matter on the record for the protection of the rights of Day dealt with protection of those rights in any State court proceedings that might arise as a result of the transactions about which Day testified. It is suspicious that, although Mr. Beckner had firsthand knowledge of the relevant facts and the transcript of Mr. Forrest's testimony which was annexed to the motion of petitioner attributed such knowledge to Mr. Beckner but the State's attorney said Mr. Beckner had exercised a right not to testify under some undisclosed provision of the Code of Federal Regulations which prevented him from doing so, Judge West made no effort to ascertain those facts before summarily dismissing petitioner's motion for relief pursuant to 28 U.S.C. §2255.

told Earl Day and his attorneys that Day had immunity. Since Day's attorneys were more concerned with a subsequent State prosecution and the impact of Day's testimony against petitioner in such an event than they were with a possible federal prosecution of Day for his alleged role in this matter (upon which, according to the Automatic Discovery Letter ¶4, he had already been granted informal transactional immunity in exchange for his testimony against petitioner), petitioner's allegation that the Government expanded the disclosed form of immunity to "use immunity" and did not disclose that expansion is easily believable and certainly is not "palpably incredible or patently frivolous," Blackledge v. Allison, supra, 431 U.S. at 76, 78, in view of the fact that there would have been no reason for Day to refuse to testify without immunity if he had already re-

ceived the type of immunity disclosed by ¶4 of the Discovery Letter and such form had been regarded as adequate by his attorneys. Obviously, nothing less than "use immunity" was satisfactory to Day's attorneys and he was given that form of immunity before he testified against petitioner at the trial of this case.

Because Day's counsel in the State court proceedings often used the words "use immunity" and "total immunity" interchangeably during his testimony, the district judge seized upon that language in the exhibit annexed to petitioner's motion to suggest the frivolity of petitioner's claim because a federal prosecutor is not empowered to grant a witness transactional immunity against State prosecution. The context of Mr. Forrest's testimony, however, clearly showed that it was "use immunity," applicable in State proceedings, to

which he referred in his testimony. It was in the light of a claim that the Government had expanded the original agreement with Earl Day and his attorneys to grant "use immunity," not transactional immunity against State prosecution, that petitioner's motion for §2255 relief should have been considered and adjudicated.

Like the respondent Allison, petitioner herein is "entitled to careful consideration and plenary processing of [his claim,] including full opportunity for presentation of the relevant facts.' Harris v. Nelson, 394 U.S. [286], at 298 [(1969)]." Blackledge v. Allison, supra, 431 U.S. at 82-83. Petitioner was not granted such consideration and processing of the claim made by him in the district court. Instead, the district judge changed the nature of petitioner's complaint to one which was legally friv-

olous and, so changed to suit the purposes of the district judge, declared the petitioner's position to be frivolous. That not only constituted a usurpation by the district judge of the type mentioned in Powell v. Alabama, supra, 287 U.S. at 68, but it constituted a usurpation of the petitioner's right to frame his own contention and to have his case adjudicated on the basis of his claim rather than a bogus claim which he had not even made.

This Court should thus vacate the judgments of the Courts below and remand this cause to the United States District Court for the Middle District of Louisiana for a proper hearing, with full opportunity to present the relevant facts within the knowledge of the witnesses who possess firsthand knowledge, including the testimony of Mr. Beckner (the now former United States Attorney) and Mr. Richard Olsen

(the then former Assistant United States Attorney who conducted the immunity negotiations on behalf of Earl Day).

2. The District Court has decided this case in a manner which conflicts with applicable decisions of this Honorable Court and the Court below, by affirming the judgment of the district court and adopting that court's findings and conclusions, has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise by this Court of its power of supervision.

This Court, in Giglio v. United States, 405 U.S. 150 (1972), expounded a rule of law of constitutional proportion which was necessary to be followed in order to conform to due process of law. Such a rule of law is entitled to respect, even by Government attorneys and federal district judges. The rule of Giglio requires Government attorneys to furnish defense lawyers, upon request, evidence or information affecting the credibility of

its key witnesses, especially such information as a grant of some form of immunity as a condition upon which the witness testifies for the Government and against the defendant. The Automatic Discovery Order of the United States District Court for the Middle District of Louisiana was, with respect to the paragraph requiring disclosure of Giglio material, implemented to mandate disclosure by the Government of such information without the necessity of a specific request therefor by defense attorneys, all of whom would routinely ask for disclosure of such vital information were it not for the automatic obligation of the Government to furnish it pursuant to the Order, thus tying up the district courts with hearings upon this type of motion. Clearly, where a district court has entered such an order applicable to all criminal cases within its jurisdiction,

the defense may rely upon the Government's disclosures as being complete and there is no necessity for any further request by defense counsel that the prosecutor disclose that which he is continuously obligated to disclose.

In reviewing the petitioner's motion for a judgment of acquittal when considering petitioner's direct appeal from the judgment of conviction, the Fifth Circuit Court of Appeals cited the fact that Earl Day had changed his vote after petitioner solicited him to do so as evidence the jury could have considered in determining petitioner to be guilty of the offense of aiding and abetting the attempted extortion of Charles Carter & Co., Inc. Earl Day was the only source of that testimony. The Government had two key witnesses against petitioner--Day and Jack Menzie. The verdicts on the perjury charges clear-

ly show that the jury did not convict petitioner upon any count of the indictment which was based on Menzie's testimony alone. Such a determination by the jury to rely upon Menzie's testimony only if it was corroborated might well have been based on the fact Menzie had been granted "use immunity" and had not been prosecuted for his involvement in the crimes with which petitioner was charged. The Trial Court instructed the jury to view such testimony with suspicion and to accept it only if the jury found it to be credible beyond a reasonable doubt. Menzie was free to say anything the Government might have indicated an interest in hearing without fear that such information could be used against him in the event he was charged in State court with those transactions. The situation was apparently different with regard to Earl Day, so far as the jury and

defense counsel were made aware, because the Government concealed the fact that Earl Day had been granted "use immunity." So far as State prosecution was concerned, his declarations in federal court were admissions against penal interest which "supposedly" were admissible against him in State proceedings--"supposedly" because the Government had in fact granted him the same type immunity, although not in the same type proceedings, as it had granted Jack Menzie. It did not disclose that to the defense. The jury could well have reasoned that Day would not speak an untruth and thereby subject himself to State prosecution, hence his testimony was credible. Because it was not disclosed that he testified under a grant of "use immunity," his testimony was rendered more credible, especially when contrasted with the jury's handling of the testimony of a similarly

situated witnesses whose "use immunity" was disclosed to the jury, yet the only difference in the status of the witnesses was the disclosed immunity of Jack Menzie and the concealed "use immunity" of Earl Day. Had the Government properly disclosed to the defense the grant of "use immunity to Earl Day, the result with regard to Count II of the indictment might well have been acquittal, just as it was with regard to Counts I, III, IV and V of the indictment.

As this Court observed in United States v. Agurs, 427 U.S. 97, 111 (1976), "[i]f the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the

cause of justice." For that reason, this Court held that prosecutorial suppression of favorable evidence does not require a demonstration by the defendant that its disclosure probably would have resulted in acquittal, 427 U.S. at 111 n. 19 and accompanying text, and held, instead, that (427 U.S. at 112-113):

> The proper standard of materiality must reflect out overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. (Footnotes omitted.)

It should be remembered that Agurs

dealt with an issue of non-disclosure of exculpatory evidence, not evidence affecting the credibility of a key witness for the Government. The Courts are in a far better position to determine whether a piece of evidence might have created a reasonable doubt of guilt than they are to determine whether omitted evidence might have affected a witness' credibility with the jury (especially in view of the above referred to jury instructions) and thus have created a reasonable doubt of the defendant's guilt. Regardless whether a Giglio issue should be viewed differently than an issue raised under Agurs and Brady v. Maryland, 373 U.S. 83 (1963) because of the difference in the courts' roles with regard to sufficiency and credibility of the evidence--the Agurs/Brady situation dealing with the more traditionally "judicial" issue of sufficiency of

the evidence while the Giglio situation deals with the matter of credibility of the witnesses which is traditionally left to the jury without interference or second guessing by the judiciary--, it is clear that an adverse impact upon the credibility of the Government's witness, Earl Day, would have had a substantial impact upon the jury's verdict. The Court of Appeals felt the testimony of Earl Day was necessary to the explanation of the sufficiency of the evidence against petitioner on the direct appeal from the ruling of the district court on petitioner's motion for a judgment of acquittal. Moreover, the jury was unable to return a verdict of guilty on Count II prior to the misinstruction by the Court, equating an aiding and abetting charge with being an accessory after the fact, see Petition for a Writ of Certiorari in Gerald v. United States, No. 80-

1072 of the Docket of this Court, p. 51 et seq.. The jury shortly returned a verdict on Count II of aiding and abetting Jack Menzie's attempted extortion of Charles Carter & Co., Inc., which may well have been based on Earl Day's testimony that he changed his vote before the City-Parish Council upon petitioner's solicitation that he do so. The validity of the jury's verdict was questionable upon the basis it was provoked by misinstruction upon the law which required the jury to convict upon a charge never made. If the jury had been told to apply the same standards to the testimony of Earl Day which it applied to Jack Menzie's testimony, then Day's testimony would not have sufficed for a conviction even on the instruction changing the nature of the alleged offense which had been given by the Trial Court after the jury inquired simply wheth-

er, in Count II, petitioner was charged with aiding and abetting. Since the jury acquitted petitioner on Counts I, III, IV and V of the indictment, it is very likely that without Day's testimony that petitioner caused him to change his vote before the City-Parish Council the jury would have acquitted petitioner of Count II, also. Surely, the lack of credibility of Earl Day (which reasonably could have been determined by the jury on the same basis it had determined to reject the uncorroborated testimony of the actually, but the similarity undisclosed, similarly situated witness, Jack Menzie) would have created a reasonable doubt which did not otherwise exist because the Government had concealed from the petitioner and the jury the factual basis to apply the same instruction against Day's testimony which was applied against Menzie's testimony. The non-

disclosure of this Giglio information violated petitioner's constitutional right to due process and prejudiced him in the exercise of his right of confrontation of the key witness, Earl Day.

CONCLUSION

For the foregoing reasons, this Honorable Court should vacate the judgments of the Fifth Circuit Court of Appeals and the District Court for the Middle District of Louisiana and this cause should be remanded to the District Court with instructions to conduct an evidentiary hearing and to grant petitioner's motion if it is shown that Earl Day was granted "use immunity" which was not disclosed to defense counsel pursuant to the obligations of Giglio and the Automatic Discovery Order of that Court and such information would have created a reasonable doubt which did not otherwise exist in this case.

Respectfully submitted,

JAMES A. MC PHERSON
Attorney for Appellant
McPHERSON & ZAINEY
419 Carondelet Street
New Orleans, LA 70130
[504] 581-1973

CERTIFICATE OF SERVICE

I, James A. McPherson, Attorney of Record for the Petitioner and a Member of the Bar of the United States Supreme Court, certify that I have served by United States Mail three copies of the foregoing Petition for a Writ of Certiorari and the annexed Appendix upon the Solicitor General of the United States, first class postage prepaid, by addressing an envelope containing same to him at his official address and posting same at the United States Post Office, Main Branch, Loyola Avenue, New Orleans, Louisiana, this ____ day of _____, 1982.

All parties required to be served have been served.

_____
JAMES A. MC PHERSON
Attorney at Law

Appendix

APPENDIX F

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States in pertinent part provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The statutes describing the offense with which the petitioner was convicted, 18 U.S.C. §§1951 and 2, read in pertinent part as follows:

18 USC §1951:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by * * * extortion or attempts or conspires so to do, * * * shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section--
>
> * * * * * *
>
> (2) The term "extortion" means the obtaining of property from another,

with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

* * * * * *

18 USC §2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 28, U.S. Code, Section 2255 provides in relevant part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, * * *, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively

show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that * * * there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

* * * * * *

Rules Governing Section 2255 Proceedings for the United States District Courts, in relevant parts, provide:

Rule 1(1):

These rules govern the procedure in the district court on a motion under 28 U.S.C. §2255:

(1) by a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitu-

tion or laws of the United States * * *.

Rule 4:

(a) The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. * * *

(b) The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

Rule 7:

(a) If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of addi-

tional materials relevant to the determination of the merits of the motion.

(b) The expanded record may include, without limitation, letters predating the filing of the motion in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) The court may require authentication of any material under subdivision (b) or (c).

Rule 8:

(a) If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer if filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such dis-

position of the motion as justice dictates.

Appendix

81-1997

Office - Supreme Court, U.S.
FILED
APR 26 1982
ALEXANDER L. STEVAS
CLERK

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GASTON GERALD,

Petitioner,

vs.

UNITED STATES of America,

Respondent.

On Application for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

JAMES A. MC PHERSON
Attorney for Appellant
McPHERSON & ZAINEY
419 Carondelet Street
New Orleans, LA 70130
Telephone [504] 581-1973

INDEX TO APPENDIX

APPENDIX A
Per Curiam of Court of Appeals Adopting District Court Opinion A-1

APPENDIX B
Per Curiam of Court of Appeals Denying Rehearing A-3

APPENDIX C
Findings of Fact and Conclusions of Law of District Court A-5

APPENDIX D
Testimony of Earl Day at Petitioner's Federal Trial A-17

APPENDIX E
Testimony of Robert Forrest, Esq., Attorney for Earl Day, at State Court Proceedings (Appendix B to Petitioner's Motion for a New Trial or For Relief Pursuant to 28 U.S.C. §2255 A-38

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 81-3299

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

GASTON GERALD,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Louisiana

---

(December 17, 1981)

Before CLARK, Chief Judge, RUBIN and TATE, Circuit Judges.

PER CURIAM:

AFFIRMED on the basis of the opinion of the District Court entered May 18, 1981.

ABR 12-16-1981
CC
AT

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 81-3299

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

GASTON GERALD,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Louisiana

---

ON PETITION FOR REHEARING

(JANUARY 26, 1982)

Before CLARK, Chief Judge, RUBIN and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

s/ Albert Tate
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA CRIMINAL

VERSUS

GASTON GERALD NUMBER 79-1

RE: DEFENDANT'S MOTION TO VACATE SENTENCE AND FOR NEW TRIAL

E. GORDON WEST, Senior Judge:

This case is before the Court on a motion entitled "Motion to Vacate Illegal Sentence and Motion for New Trial" filed by the defendant, Gaston Gerald, pursuant to the provisions of Title 28, United States Code, Section 2255. The motion was accompanied by a detailed statement of facts and by an exhaustive brief in support thereof. Pursuant to order of Court,

the plaintiff, through the United States Attorney, has responded thereto. After due consideration of the record as it now stands, the Court concludes that no further hearing or oral argument is required on this motion.

The grounds upon which relief under the motion are sought are two-fold. First, the defendant contends that a prosecution witness by the name of Earl Day was granted immunity from prosecution by the United States Attorney, and that neither the defendant nor his counsel were aware of the extent of the immunity. Secondly, the defendant contends that one of the jurors who heard the case failed, on voir dire, to respond to a question concerning whether or not the jurors had seen or heard anything about the case in the news media, when in fact she had heard of the case through news media reports.

THE IMMUNITY ISSUE

The indictment in this case was returned and filed on January 3, 1979. The indictment contained five counts. The first count charged defendant with conspiring, in violation of Title 18, United States Code, Section 1951, to attempt to affect commerce and to affect commerce by extortion. He was found not guilty on that count. Count II charged the substantive offense of unlawfully attempting to affect commerce or actually affecting commerce by extortion in violation of Title 18, United States Code, Section 1951, and also of aiding and abetting others in the violation of that statute. The jury found him not guilty of personally committing the substantive offense but found him GUILTY of Aiding and Abetting as defined in Title 18, United States Code, Section 2. Counts III, IV, and V each charged the

defendant with making false declarations to a United States Grand Jury in violation of Title 18, Section 1623. The jury found him not guilty on these three counts. This was the result of the jury trial held before this Court on August 14 and 15, 1979.

On January 10, 1979, seven days after the indictment was returned, the United States Attorney directed a letter to defense counsel, Jim McPherson, Esq., making several discovery disclosures as required by this Court's Uniform Order for Automatic Discovery. The portion of that disclosure pertinent to the present motion states:

" * * * * *

> "4) It has been agreed by the Government, Earl Day and his attorneys that if Day re-appeared and testified truthfully before the grand jury, and at trial, that the Government would not seek perjury charges against Day arising from his initial appearance before the grand jury, and

would agree not to seek any substantive charges against Earl Day on matters arising from the assessment of liquidated damages to Carter and Company, Inc."

As a result of this grant of immunity, Earl Day did reappear before the grand jury, and he did appear and testify as a witness for the Government at the trial of the case. Defendant now says that since the letter "* * * did not state that Earl Day was given immunity and it did not name or indicate to defense counsel the existence of any substantive charges in connection with the Carter case which could have been brought against Earl Day * * *", defense counsel did not consider the letter to mean that immunity had been granted, but rather considered it "* * * to have been nothing more than a catch-all agreement made to satisfy Councilman Day's or his counsel's concern about unanticipat-

ed areas of exposure to criminal liability."

This argument is specious.

The letter speaks for itself, and clearly indicates and affirms that a grant of immunity had been given to Earl Day in return for truthful testimony before the grand jury and at the trial of the case.

Not only is the letter clear as to the grant of immunity, but counsel for the defendant well knew what the letter said and meant. During cross-examination of Mr. Day, counsel for defendant questioned him about the fact that he had been assured that he would not be charged with making false declarations if he would now tell the truth to the grand jury and at the trial. Defense counsel also in his argument to the jury reminded the jury of the promised immunity when he referred to the "private little deal" that Earl Day

had worked out with the United States Attorney.

Defendant also contends that immediately before testifying at the trial, the Government extended the immunity from prosecution to cover State Court prosecutions as well as immunity from Federal prosecution. Not only is there no evidence of such a promise, but there is evidence that no such promise was made. The United States Attorney has executed and filed a sworn affidavit stating that no such extended immunity was provided and, as pointed out by the United States Attorney, and as is well known to defense counsel, neither the United States Attorney nor the United States District Court would have any authority to grant a prospective witness immunity from State prosecution for violation of a State law. Since there is no question but that defense counsel knew

of the immunity which had been granted insofar as Federal prosecution is concerned, and since defense counsel did in fact make reference to this immunity while cross-examining Mr. Day and while arguing to the jury, there was certainly nothing to prevent counsel for the defendant from pursuing the immunity question to his heart's content during the cross-examination of Mr. Day had he elected to do so. He knew an immunity had been granted, and he had Mr. Day under cross-examination. He questioned him about the immunity, and he could have questioned him further had he wished to do so. He cannot now claim that his client was unduly prejudiced by this grant of immunity.

It must be noted here that after the trial of this case, Earl Day was in fact charged by the State of Louisiana with committing public bribery in violation of

La.R.S. 14:118. After a preliminary hearing and a hearing on a motion to quash the indictment, the State Court did, for its own reasons, quash the public bribery indictment. Defense counsel now says that this was done because Mr. Day claimed he had been given "total immunity" in exchange for his testimony. But there is absolutely nothing in this case to indicate that the United States Government attempted to grant Mr. Day immunity from possible State Court prosecution over which it obviously had no control. The letter setting forth the agreement speaks for itself, and defense counsel was well aware of the content of that letter. While cross-examining Mr. Day, defense counsel had full latitude to delve into the immunity agreement as deeply as he wanted to, and he did exactly that. He cannot now be heard to say that evidence was withheld

from him, because it simply was not. The Government, in its letter of January 10, 1979, fully informed the defendant, through his attorney, of the entire agreement which it had with Mr. Day. This is all that the law requires. See Giglio v. United States, 92 S.Ct. 763 (1972). Also, as evidenced by defense counsel's cross-examination of Mr. Day, and by his closing argument to the jury, the jury was adequately informed as to the immunity that was actually granted.

The defendant now contends that he could not have been convicted without the testimony of Earl Day. This is simply not true. The evidence in this case, including the testimony of the defendant himself, the testimony of Robert Carter, Jack Menzie, Special Agent London M. Howard, and the tape recordings of the defendant's own voice, was overwhelmingly supportive

of conviction on the charge of aiding and abetting in the commission of the offense charged. The only surprising aspect of the case was the acquittal on the charge of conspiracy, which the Court felt was overwhelmingly supported by the evidence. The acquittals on Counts I and V strongly support the conclusion that the defendant was in fact not at all prejudiced by the testimony of Earl Day. Count I was the conspiracy charge, and Count V charged the defendant with testifying falsely before the grand jury when he said he never talked with Earl Day about the Carter situation. These are the two counts to which the Earl Day testimony primarily related. The defendant was acquitted on both counts.

The fact remains that the Aiding and Abetting charge was overwhelmingly support-

ed by evidence other than any testimony given by Earl Day.

Thus, the Court finds no merit to defendant's present contention that the Government failed to disclose the extent of its agreement with the witness, Earl Day, and that he, defendant, was prejudiced thereby.

ALLEGED MISCONDUCT OF JUROR

* * * * * * *

Therefore, for these reasons, defendant's motion to vacate the sentence, and/or for a new trial, will be denied, and an appropriate order will be entered herein.

Baton Rouge, Louisiana, May 18, 1981.

s/ E. GORDON WEST
UNITED STATES SENIOR DISTRICT JUDGE

APPENDIX D

[Tr. 254]

EARL N. DAY, being first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION:

BY MR. HILL:

Q. Mr. Day, would you identify yourself please for the ladies and gentlemen of the jury?

A. Earl Newsom Day.

Q. And where are you employed, Mr. Day?

A. Creole Sales.

Q. In what capacity?

A. Municipal Supplies salesman.

Q. Are you also a member of the Baton Rouge City-Parish Council?

A. Yes.

Q. Mr. Day, are you represented here today by an attorney or counsel?

A. Yes.

Q. Are they in the courtroom?

A. Yes.

Q. What are your attorneys' names?

A. Richard Olsen.

Q. Mr. Olsen is here today, is that correct?

A. Yes.

Q. Okay. Now, do you recall appearing before the United States Grand Jury on two occasions?

[Tr. 255]

A. Yes.

Q. Do you recall after the first occasion appearing before the Grand Jury that you were contacted by me or by our office, do you recall that?

A. I do.

Q. And you were asked if you wished to come back to the Grand Jury and clear up some matters concerning your first appearance before the Grand Jury; do you recall that, sir?

A. I do.

Q. And did you, in fact, reappear?

A. I did.

Q. Now, the first time you testified before the Grand Jury, you made some statements that were not true, is that correct, sir?

A. That's right.

Q. And you came back at a later time and told the truth before the Grand Jury, is that right?

A. I did.

Q. Okay, sir. Now, have there been any agreements made between you and your attorney and the office of the United States Attorney concerning that Grand Jury appearance?

A. I was told if I come back and straightened my testimony out, my first testimony, and tell the truth, that I would have an opportunity to come back to this Grand Jury and tell them the truth.

[Tr. 256]

Q. And that opportunity was given you, and you took the opportunity and you came back the second time and you told the truth?

A. I did.

Q. And you know you're under oath today?

A. Yes.

Q. And you know you're under an obligation today to tell the truth?

A. I do.

Q. And you know that if you don't tell the truth today, that you could be indicted and charged with perjury, do you know that?

A. I know that.

Q. All right, sir. You indicated that you're a member of the City-Parish Council; when were you elected to the council?

A. 1976.

Q. And what is your District? Council District?

A. Ward 2, District 1.

Q. Is that the same district or -- correction. Strike that.
Is Gaston Gerald the State Senator that represents that District?

A. He does.

Q. What are your committee memberships on the City
[Tr. 257]
Parish Council, sir?

A. Finance and Budget, Capital Improvements, Planning and Zoning.

Q. All right. Now, in the course and scope of your duties as a City-Parish Councilman, did you have occasion to become aware of the issue of the assessment of late charges to Bob Carter on the Governmental Building?

A. I did.

Q. When did you first become aware of that issue?

A. When it came before the Capital Improvements Committee.

Q. Of which you are a member?

A. Yes.

Q. And do you remember when in the year that was? Was it before these council votes?

A. Yes.

Q. So was it sometime in late 1977? The Council votes occurred in 1978.

A. Right.

Q. And you said that you first heard about those when it came before the Finance and Budget Committee?

A. Yes.

Q. And the issue before the Finance and Budget Committee or Capital Improvements Committee was whether or not to assess late charges, is that right?

A. Yes, sir.

[Tr. 258]

Q. Now, during the time that it came before that committee, before it got to the actual council, did you have occasion to vote on whether or not Carter should be assessed late charges?

A. I did.

Q. And how did you vote?

A. I voted to assess.

Q. To assess. And your vote was consistent in the committee meetings to assess?

A. Right.

Q. Now, I want to direct your attention to a meeting in December -- December 20, 1977, attended by yourself and Jack Menzie, Vance Louque and his father, John Bolton and George Dabbs. Do you recall that meeting at Mike and Tony's?

A. I do.

Q. And what was the issue under discussion at that luncheon meeting?

A. Not to assess liquidated damages in order to help the subs collect their money.

Q. And the sub-contractors were lobbying you in an effort to convince you and Mr. Dabbs to vote not to assess Carter?

A. Yes.

Q. And that was in December of 1977. I want to direct your attention to the chart that you can see on your right,

[Tr. 259]

sir, which is marked as Government 15, and direct your attention more specifically to the first column in that chart, the vote on January 11, 1978. That was the first council vote -- actually of the whole council on the issue of whether or not to assess Carter. How did you vote on that date, sir?

A. I voted yes.

Q. You voted yes, to assess?

A. Right.

Q. And that is consistent with the way you had been voting in your committee?

A. Yes.

Q. Now, after that January 11 meeting -- vote rather, did you have occasion to visit with defendant Gaston Gerald at his office at Brownsfield Elementary School?

A. I did.

Q. And did the conversation involve whether or not to assess Carter damages, the issue which was before the Council?

A. It did.

Q. And did Mr. Gerald ask you to vote either way on the twenty-fifth, the time of your next vote?

A. He asked me to help the subs and Charles Carter by voting no.

Q. By voting no on the twenty-fifth?

A. Yes, sir.

[Tr. 260]

Q. And you voted no on the twenty-fifth?

A. Right.

Q. Your vote changed?

A. Yes.

Q. And you testified earlier that you represent many of the same people that Gaston Gerald represents; you represent them on the City Council, Mr. Gerald represents them in the State Senate? Is that right?

A. Right.

Q. Now, there has been testimony there that before Mr. Gerald was a member of the State Senate, he was a member of the City Council. Do you know that to be a fact?

A. Right. That is when I first became acquainted with Mr. Gerald, and became a political ally of his.

Q. You're a political ally of Mr. Gerald?

A. I helped for him in most all of his elections.

Q. Has he helped you when you ran for the City Council?

A. Yes.

Q. How did he help you?

A. He helped me with certain groups, in getting their support.

Q. What kinds of groups?

A. The black groups and the labor groups.

Q. And those two groups were very important to your election?

[Tr. 261]

A. Yes, sir.

Q. Did he also introduce you to other influential constituents in your area?

A. Well, he may have, but I knew most of them.

Q. And your testimony is that from the time Mr. Gerald first ran for office, you've been a political ally of Mr. Gerald's and he, in turn, has helped you?

A. Yes.

Q. Is that why on the twenty-fifth, the twenty-fifth vote, you voted the way Mr. Gerald asked you to vote?

A. To help him and to help the sub-contractors.

Q. Mr. Gerald asking you was the thing that changed your mind, wasn't it, Mr. Day, because you had met on December 20th before the first vote with the subs and they hadn't completely changed your mind at that meeting, is that right, sir?

A. That's right.

Q. Now, at the meeting at Brownsfield when Mr. Gerald asked you to vote for Mr. Carter, did you have occasion to go through with Mr. Gerald how each one of the other councilmen were lined up to vote?

A. (No response.)

Q. Did Mr. Gerald ask you how Carl Crane was going to vote?

A. In general conversation, as best I can recollect,

[Tr. 262]

we discussed the way the council would vote.

Q. Each one of the councilmen?

A. Very possibly.

Q. All right. Now, did Mr. Gerald specifically ask you to intercede with any of your councilmen in Mr. Carter's behalf?

A. I volunteered to talk to Pearl George, Mike Roubique, and Marsellus.

Q. Now, when you say you volunteered, did Mr. Gerald ask you to talk to those people?

A. In talking to the council, that's the ones I told him I'd talk to.

Q. Now, was that at Mr. Gerald's insistence? Did he ask you to talk to those council members?

A. The best I can remember.

Q. The best you can remember?

A. Yes.

Q. And did you, in fact, talk to Pearl George, Mike Roubique and Howard Marsellus?

A. I talked to Pearl George and Mike Roubique; I did not talk to Howard Marsellus.

Q. Now, in your conversations with Pearl George and Mike Roubique, did you offer either one of those two people or both of those people any money in return for their vote?

A. I did not offer them money directly. I promised to

[Tr. 263]

help them with campaign contributions.

Q. In what sum of money?

A. Five hundred dollars apiece.

Q. Was that five hundred dollars coming from Gaston Gerald?

A. No, sir.

Q. Who was it coming from?

A. I anticipated soliciting subcontractors whom I was helping with my vote.

Q. But you didn't have the five hundred or the thousand dollars in your pocket at the time you talked to Mrs. George and Mr. Roubique?

A. I did not.

Q. And your testimony is that you did not know for sure at the time you could get it, but you were going to solicit it from the contractors?

A. That's correct.

Q. Now, in your first Grand Jury testimony, you said that that was not correct, and that is one of the inconsistencies that -- one of the corrections that you made when you came back the second time, is that right?

A. Yes, sir.

Q. The other thing that you cleared up the second time was whether or not you had met with Gaston Gerald before the Council vote on the twenty-fifth; isn't that right, sir?

A. Yes.

Q. Now, when you testified before the Grand Jury on your first trip there, you testified you had not contacted Gaston Gerald, or that Mr. Gerald hadn't talked to you in relation to the council vote; why did you testify that way?

A. When I came before the Grand Jury the first time, I was nervous, afraid, I didn't want to hurt anybody; I didn't want to get myself into any trouble.

Q. Were you afraid in admitting that Mr. Gerald had talked to you about the Council Vote would hurt Mr. Gerald?

A. It being asked in the Grand Jury, yes.

Q. And so you decided not to tell the Grand Jury in order to try to protect Mr. Gerald?

A. Yes, sir.

Q. You also denied offering five hundred dollars in campaign contributions or otherwise to Pearl George and Mike Roubique. Didn't you?

A. I did.

Q. Why did you testify that way?

A. I was nervous. I didn't want anyone to get in any trouble, and I later realized I made a mistake.

Q. And that is when we or the United States Government allowed you to come back and testify before the Grand Jury on a second occasion?

A. Yes, sir.

[Tr. 265]

Q. Just a moment, your Honor.

One more question. You said earlier that you recognize that you are under oath today and you realize that you have an obligation to tell the truth. Has your testimony on the stand today been truthful, sir?

A. Yes, sir.

MR. HILL: That is all I have. Answer Mr. McPherson's questions.

CROSS EXAMINATION:

BY MR. MC PHERSON:

Q. Mr. Day, when you appeared before that first Grand Jury, was Mr. Hill there?

A. Yes.

Q. Did he tell you that you were under oath and that you were under an obligation to tell the truth?

A. He did.

Q. The same thing he told you today, wasn't it?

A. Yes, sir.

Q. It didn't mean a thing to you that first day, did it?

A. (No response)

Q. You lied to that Grand Jury that day, didn't you?

A. I admit to that.

Q. You did, didn't you, sir? Mr. Day, let me ask you this. Is it your testimony

[Tr. 266]

that you offered five hundred dollars to Pearl George and to Mike Roubique for their vote in regard to the Carter situation? Is that true?

A. Right. I offered it in terms of campaign contributions. I did not offer it to them in cash.

Q. You offered them five hundred dollars in campaign contributions to each of them if they would vote the way you wanted them to vote in regard to the Carter problem with the assessment of late damages, late charges, is that correct?

A. Yes.

Q. How did you want them to vote, for or against Carter?

A. I wanted them to vote for Carter.

Q. That would be not to assess--

A. Yes.

Q. --damages?

A. Yes.

Q. The five hundred dollars of campaign contributions that you were going to pay them, you were going to get that from the sub-contractors; is that right?

A. That is correct. I was going to solicit it.

Q. Had you already talked to the sub-contractors and made arrangements to get those five hundred dollars?

A. No, sir.

Q. But you were going to go back to them and tell them that you had gotten favorable votes for them and that

[Tr. 267]

they should give you some money. What were you going to tell those subs, Mr. Day?

A. I was going to solicit like you solicit most any campaign contributions.

Q. Were you going to tell them -- Did you have a campaign coming up at that time?

A. No.

Q. What were you going to tell them? That you had done them a favor and they ought to give you some money?

A. I didn't have any specified statement.

Q. You were going to tell them that you had paid, bribed some other councilmen?

A. No.

Q. That is about what it comes down to, doesn't it?

A. Not in my opinion.

Q. Now, Mr. Gerald had nothing at all, as I understand your testimony, to do with your decision on the offering of five hundred dollars to Pearl George and Roubique; that was your own deal, is that true?

A. Yes, sir.

Q. Do you recall Gaston Gerald did contact you in regards to a drainage problem in your district that involved some friends of his named Powell and Lipscomb?

A. I do.

Q. And these were two elderly gentlemen that were hav-

[Tr. 268]

ing a dispute about some back-up of the drainage water in their yards and so on?

A. Exactly. One man had stopped up a culvert and we later remedied the situation.

Q. And didn't -- You don't meet or discuss things with Gaston on a weekly or monthly basis, do you?

A. I see Gaston often.

Q. And is it generally in regard to something like a problem that some constituent has or something of that type?

A. Gaston having served on the Parish Council, living in my district, some of those old folks out there come to him rather to me, and then he, in turn, tries to contact me to -- if it's a parish matter, to help remedy the situation.

Q. He passes the problem on to you?

A. Yes.

Q. And this drainage problem between Powell and Lipscomb was a typical situation, two neighbors having a dispute about back up of drainage water, and Gaston called you. I think you went out to the site, didn't you?

A. I did.

Q. And helped straighten it out, about that culvert being cleaned up or unstopped or something of that type?

A. Dug a drainage canal.

Q. And that was about the time that you say that you went to Gaston's office and discussed the Carter situation?

[Tr. 269]

A. Very possibly it could have been discussed on the same day.

Q. Is it possible that you discussed that drainage situation and not the Carter situation in his office?

A. No.

Q. When did you have your open-heart surgery?

A. October.

Q. What year?

A. '77. It might have been '78. This is '79. It will be two years in October. '77.

Q. Did you go through a period of time there where your memory was not functioning too well? You were a sick person?

A. I had five heart by-passes; and I went through a time of recuperation under heavy medication and sedation.

Q. Now, have you read the indictment against Gaston Gerald?

A. No, sir.

Q. I tell you, sir, in Count V of the indictment, Gaston is charged with making a false declaration before the Grand Jury. That was when he was asked the question: Did you ever talk or did Earl Day ever come by and talk to you about the Carter situation. Earl Day never came to my office and discussed the Carter situation.

[Tr. 270]

Based on that question asked of him before the Grand Jury, and his response, he was charged in Count V of this indictment with making a false declaration. Now, Mr. Day, when you went before the Grand Jury, you made false declarations, didn't you, sir, in regards to the five hundred dollars to Pearl George and Roubique?

A. I did.

Q. You were offered an opportunity to come back and straighten that out and not be charged with false declarations if you would tell -- if you would testify that you went by Gaston's office and discuss [sic] the Carter situation? Wasn't that your understanding of the arrangement?

A. If I would come back to the Grand Jury and tell them the truth.

Q. And based on that, you were not charged with having previously made false declarations that is regarding the five hundred dollars political contributions to George and Roubique? You have not been charged with that, have you, sir?

A. No, sir.

Q. In regards to this alleged meeting that you had with Gaston in his office, did you go out and offer any council member any money on behalf of Gaston, or anything like that?

A. Not on behalf of Gerald.

Q. What you did was entirely on your own behalf, was it not?

[Tr. 271]

A. Right.

MR. MC PHERSON: No further questions.

MR. HILL: No redirect, Your Honor.

THE COURT: May this witness be excused?

MR. HILL: He may, your Honor.

THE COURT: You are excused sir; you may leave, if you wish.

MR. BECKNER: At this time, the Government rests.

APPENDIX E

"EXHIBIT 'B' TO DISTRICT COURT MOTION"

NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

STATE OF LOUISIANA

VS. NO. 9-79-3

EARL DAY

EXCERPT OF TRANSCRIPT OF TESTIMONY TAKEN BEFORE HONORABLE FRANK FOIL, DISTRICT JUDGE, 19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, IN THE CAPTIONED CAUSE ON SEPTEMBER 25, 1979

[TESTIMONY OF MRS. PEARL GEORGE AND MR. MIKE ROUBIQUE OMITTED AS BEING IRRELEVANT TO THE IMMUNITY ISSUE PRESENTED IN THIS CASE]

[Tr. 56]

Robert Forrest, called on direct examination by the defense, after having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. OLSEN:

Q. Sir, would you state your name for the record?

A. Bobby Forrest.

Q. And, what is your occupation.

A. I'm an attorney.

Q. Do you know the defendant before the bar over there?

A. I do.

Q. In connection with the trial in Federal Court on Senator Gaston Gerald, did you have occasion to or did you in fact represent Mr. Day?

A. I did.

Q. Was Mr. Day given any form of written or verbal immunity in connection with those procedures?

A. He was given verbal immunity immediately before testifying in my presence. And, we later found that the U.S. Attorney had written the defense a letter notifying him that he was granted immunity, and I subsequently got a letter from Don Beckner to that effect. The verbal immunity was made be [sic] Mr. Michael Hill, Assistant U.S. Attorney in the Federal Court Building immediately before Mr. Day was called to the stand in the Gaston Gerald trial.

Q. Mr. Forrest, I'm handing you an exhibit as the mark of purposes --- D-1. Would you examine that, please, sir?

[Tr. 57]

A. I have.

Q. Would you please tell the Court what that is?

A. This is a letter that I picked up from Mr. Don Beckner's office after a conversation with him by phone, wherein he advised me that he had written a letter to Mr. Jim McPherson, Attorney-at-Law, in New Orleans, Louisiana, who is representing Senator Gaston Gerald. And, Mr. Beckner had advised me by phone that he had given Mr. Day the opportunity to return to the Grand Jury and that he granted him immunity of the fourth paragraph, if I may read it. This is addressed to Mr. Jim McPherson. It says, ["]It has been agreed by the Government, Earl Day and his attorneys that if Day reappeared and testified truthfully before the Grand Jury and at trial, that the Government would not seek perjury charges against Day arising from his initial appearance before the Grand Jury and would agree not to seek any substantive charges against Earl Day on matters arising from the assessment of liquidated damages to Carter and Company, Inc.["] And, Mr. Michael Hill confirmed verbally to you in my presence at the day of trial, they had granted Mr. Day immunity. I don't think they had

advised him at this time of this letter and actually they had not advised you and I.

MR. OLSEN:
Your Honor, may it please the Court, in connection with the testimony of Mr. Forrest,

[Tr. 58]

I'd like to offer, introduce and file into evidence the exhibit we have marked.

THE COURT:

Is that just a xerox copy of that letter or --

THE WITNESS: Yes, sir.

MR. SINQUEFIELD: Judge, I have no objections.

THE COURT: You have no objections to its offering --- or anything? You have no question about it, State?

MR. SINQUEFIELD: I've got a question for one of the witnesses.

THE COURT: No, I mean, do you have any questions --

MR. SINQUEFIELD: Oh, no. I have no objection to the letter.

THE COURT: Any objection to it being offered in that one?

MR. SINQUEFIELD: No, sir.

THE COURT: All right. Let it be received into evidence. Please mark it, the reporter will mark it and please hand it to the Court.

MR. OLSEN: Thank you, Your Honor. I have no further questions of Mr. Forrest.

MR. SINQUEFIELD: I have.

[Tr. 59]

CROSS EXAMINATION

BY MR. SINQUEFIELD:

Q. Mr. Forrest, let me ask you this.

A. Surely.

Q. All right. First of all, the letter that -- May I have just one minute, please?

A. Okay.

Q. The letter that you just identified--that's dated January the 10th; is that correct?

A. Right.

Q. That was prior to the trial on Gaston Gerald in Federal Court?

A. That's correct.

Q. And, that letter was written to Mr. Jim McPherson, Attorney-at-Law in New Orleans, Louisiana; is that correct?

A. That's correct.

Q. Mr. McPherson did not represent Earl Day, did he?

A. Mr. McPherson represented Senator Gaston Gerald.

Q. But, then I assume the answer to my question would be no?

A. That's correct.

Q. Or to your knowledge, he didn't?

A. No, to my knowledge, I know that he did not.

Q. Okay. You represented Earl Day?

A. Correct.

Q. All right. In paragraph four of the letter as you read, it states that it has been agreed by the Government, Earl Day and his attorneys that if Day reappeared and testified truthfully before the Grand Jury and at trial, that the Government would not seek perjury charges against Day arising from his initial appearance before the Grand Jury. And, would agree not to seek any substantive charges against Earl Day on matters arising from the assessment of liquidated damages to Carter and Company, Incorporated.

A. Correct.

Q. On January 10th, 1979, did you in fact have subsequent agreement with the U.S. Attorney's Office?

A. We had met Mr. Olsen who was co-counsel with me, had met with Mr. Beckner who requested and said he would give us the opportunity. And, we talked for some thirty minutes or so until he did state that he thought it could be worked out. Now, the formal grant of the immunity was not made, I did not know that letter had been written. And, it was affirmed verbally to me prior to Mr. Day's testimony. They did tell us that they would not pursue the perjury charges against him if I recall correctly, it may be an error. But, right prior to his testimony, that he walked up to Mr. Olsen and said, ["]I just want to tell that we have granted Earl immunity.["] And then this letter was made known to me.

Q. So, I understand that. But, if I understand the -- of his testimony. On January 10th, 1979, when this letter was written, you had been informed that he would not be prosecuted for perjury, and that probably immunity could be worked out.

A. Mr. Sinquefield, I don't think that we had a formal commitment. We had, when Mr. Day went back to that Grand Jury, he went back to straighten it out, because there was some discrepancies in it. But, I don't think at the time, I may stand corrected, but I don't believe that Mr. Beckner had formally given Mr. Day immunity when we went back to that Grand Jury. And, I may stand in error, but I don't think that that's the case, be-

cause he wouldn't have confirmed it prior to trial. And, I did not know the existence of that letter. We had requested this.

Q. When had you first learn of the existence of this letter?

A. On Mr. Day's arraignment day, Mr. Olsen and I went back to the officer and were reading the transcript. And, on reading the transcript of Mr. Day, Mr. Olsen noticed that the defense had nt gone into the issue of whether or not Mr. Day had been granted immunity and there was nothing in the record, because there was no statutory immunity where pleadings were filed. This was granted by Mr. Beckner by letter, so I called Mr. Beckner and --

Q. Well, could I stop you right there?

A. Sure.

Q. I'll let you continue. I want you to explain that, but you're getting a little ahead of me.

A. Okay.

Q. And, I want to understand that myself, because it's very important to me. So, in truth of the fact, you did not learn that this letter dated, just introduced as defense exhibit one, you didn't learn of the existence of this letter until Earl Day was arraigned, after he was arraigned on the State charges; is that correct?

A. That's correct. I had the verbal, verbal --

Q. That's not what my question was.

A. --commitment. But, I did not know the existence of that letter until the day that Mr. Day was arraigned.

Q. And, this letter, to your knowledge, was not introduced into evidence at the Federal Trial of Gaston Gerald?

A. No, sir. I say, not to my knowledge. I have not looked at the transcript of Gaston Gerald's trial. But, I assume that it was not introduced into it because if had I don't think we would be here today.

Q. If I told you that it wasn't, you wouldn't argue with me?

A. I would assume, Mr. Sinquefield, that it was not, because had it been in there, I think that, as I say, the matter would have terminated before now.

Q. All right. Let me ask you --

MR. SINQUEFIELD: Let me have S-number 2.

THE COURT: Put your S-1 right here.

[Tr. 63]

BY MR. SINQUEFIELD:

Q. All right. Let me read it to you. S-1, which is the testimony that Earl made.

A. Okay.

Q. This question by Mr. Hill, all right. It begins, okay, now, do you recall a period before the United States Grand Jury, two occasions? That's a question by Mr. Hill to Mr. Day. Answer, yes. Question, do you recall that first occasion that appeared before the Grand Jury that you were contacted by me or by our office; do you recall that? Answer, I do. Question, and, you were asked if you wished to come back to the Grand Jury to clear up some matters concerning your first appearance before the Grand Jury; do you recall that, sir? Answer, I do. And, did you in fact reappear? Answer, I did. Now, the first time you testified before the Grand Jury you made some statements that were not true; is that correct, sir? Answer, that's right. And you came back at a later time and told the truth before the Grand Jury; is that right? Answer, I did. Okay. Sir, now have there been any agree-

ments made between you and your attorney and the office of the United States Attorney concerning that Grand Jury appearance? Answer, I was told if I come back, straighten my testimony out, my first testimony, and tell the truth, that I would have an opportunity to come back to this Grand Jury and tell them the truth. Question, that opportunity was given to you and you took the opportunity and you came

[Tr. 64]

back the second time, and you told the truth. Answer, I did. And, you know you're under oath today? Yes. You know you're under obligation to tell the truth? I do. And, you know if you don't tell the truth today, you can be indicted and charged with perjury; do you know? Answer, I know that. All right, sir. You indicated, et cetera. The questions go along. To my reading, this is the only mention in Earl Day's testimony of immunity. And, if you listened to my reading, of course, you see that the matter in paragraph four of this letter, which I think you testified you had no knowledge of even at the time Earl Day was testifying. That matter --

A. I testified I didn't know the existence of that letter.

Q. Right. Of that letter.

A. Right.

Q. Okay. In this transcript, to me, there's an absence of several things

in paragraph four that I need you to clarify for me. To wit, that if you testified at trial, the Government would agree not to seek any substitive [sic] charges against Earl Day on matters arising from the assessment of liquidated damages to Carter and Company, Incorporated, which I think you'll agree, it's somewhat different from the questions and answers which are in that transcript.

A. I doubt if Mr. Day -- I don't argue what's in the transcript --

THE COURT: Wait a second,

[Tr. 65]

Mr. Forrest, go ahead.

MR. OLSEN: May it please the Court, Your Honor, I don't understand how the prosecutions or the defense's methodology and Federal proceeding has any particular bearing on this. The defendant before the Bar had very little control over what questions were asked him by the United States Attorney or the defense for that matter. And, counsel for the State is attempting to have Mr. Forrest justify something that other attorneys didn't -- up for.

THE COURT: Well, he's trying to get to the fact that whether or not during the trial it was set for the trial, in fact, whether or not that this immunity had been made; isn't that right, Mr. Sinquefield?

MR. SINQUEFIELD: Yeah, Judge. As I said --

THE COURT: Overrule the objection. I'd like to know that, too.

MR. SINQUEFIELD: Let me tell you, I didn't, you know, the reason I asked is because the

[Tr. 66]

issue of use and derivative use of immunity, which I think is the issue in the most --- that y'all have filed.

BY MR. SINQUEFIELD:

Q. So, now, my question is, I think from the record, that you agree there is a difference between the grand in the letter and the grant that's in the transcript. So, obviously you must have gained knowledge of this in your meeting with Mr. Hill before Mr. Day testified.

A. Well, let me say --

Q. Well, my next question is basically this. To the best of your remembrance, exactly what did Mr. Hill -- Well, first of all, was the meeting just before Earl Day testified?

A. That's correct.

Q. Okay. To the best of your recollection, tell the Court what Mr. Hill told you in reference to immunity for Mr. Day before he testified.

A. Well, Mr. Olsen had gone up there that morning and told me he had, of course, we at several times requested total immunity. In fact, we wouldn't eve, we never discussed anything else. Mr. Hill did not tell me. I came up late. Mr. Olsen had been there and they were just coming out of the witness room and Mr. Hill walked up when they called Mr. Day, came out in the hall and told Mr. Olsen, said, Mr. Olsen, we just wanted you to know that Earl is granted immunity. All we had ever asked for

[Tr. 67]

was total immunity in derivative use and use immunity. We never discussed, I don't think we had a confirmation prior to his testimony before the Grand Jury. And, when I say I don't think, Mr. Olsen made several meetings with Mr. Day. And, I think one with Mr. Beckner. And, I was not there. I had a conflict. So, when I say some of these things was a result of conversation Mr. Olsen had out of my presence. But, Mr. Hill walked up and said, we have granted Earl immunity, he said to Mr. Olsen. And, I hadn't been there more than five minutes. I didn't sit, I had sat through some of Mr. Menzie's testimony and walked out in the hall. And, --

Q. Is it, of course, is it fair to say that you probably would not have let Mr. Day testify to the things he testified to in that trial if he had not been granted immunity?

A. I can't say that. I've discussed it with Mr. Olsen. We'd made a decision based on educated guess at the time as to what the result would be. I can't answer yes or no.

Q. Looking at paragraph four of D-1 would you look at that? After you look at it I want to ask you a question.

A. I've looked at it.

Q. Okay. As far as you're concerned, whatever Day's conversation or anything else, the granted immunity that was given to Earl Day before he testified in Federal Court covered in that paragraph?

A. I'm not going to -- that including that, I know

[Tr. 67]

the intent was that he has total immunity in my ---. This letter speaks for itself. So, and Mr. Beckner, I'm sure, has stated he will come and testify. But, that's what it means. But, I'm not going to tell you what it means. It means what it says to me. That they would not seek any substantive charges against Earl Day. And, when Mr. Mike Hill told Mr. Olsen, you have immunity , that was pursuant to our demand that it be total use and derivative use immunity.

Q. But, I think you're --

A. I didn't write this letter.

Q. I think wrong about one thing. I think --

A. May be.

Q. -- Mr. Beckner said that he, under the rules, he can't testify.

A. Well, he said he would be happy to. But, whether he can or not, I don't know. And, we had agreed that we would not question the authenticity of the letter. So, to me, this means exactly what it says. Mr. Day would not be --

Q. Well, my question just simply is --

A. You asked me --

Q. -- it's your understanding, does he have any immunity that's not reflected in that letter from the conversation with Mr. Beckner, Mr. Hill, Mr. Olsen--

A. If you would give me --

Q. --or if you consider that that paragraph told us what immunity he's got?

A. I consider Mr. Day as to having complete and

[Tr. 69]

absolute immunity. I'm not going to argue with you about the logistics or whatever or the -- that may or may not have been reflected in this letter. It says that he would not be prosecuted for perjury and they would not seek any substantive charges against Earl Day on matters concerning the Carter matter. And, Mike Hill told Mr. Olsen that Mr. Day had immunity. And, Dick thanked him very politely and put Mr. Day on the stand. My opinion is that it's total and complete. And, that's what was asked for and demanded and that's what we were told was received. And, I understand that the verbal grant is just as valid as the letter.

Q. Okay. If you, is your answer to my question that you do consider that there was additional immunity that's not reflected in paragraph four of the letter?

A. If this paragraph four --

Q. And, if so, I'd like to know what?

A. If this paragraph --

THE COURT: Wait, wait. Do you wish to speak?

MR. OLSEN: If it please the Court, Your Honor, I think this is highly argumentative because that letter is a matter of Federal procedure which directed to defense counsel, apprising defense counsel of the fact that

[Tr. 70]

a witness had been granted immunity. Which was the duty of the prosecution --- that display. The witness has explained, not only that, Your Honor, but the verbal offer of immunity that was granted in connection with that matter. And, it's, the question of the prosecutor nor, in this instance is argumentative because he's trying to read something into that that is really not before this Court, Your Honor. Now, the letter speaks for itself.

[Tr. 71]

MR. SINQUEFIELD: May I respond?

THE COURT: Yes, sir.

MR. SINQUEFIELD: Judge, it's obvious to me, the issue that Your Honor is going to have to rule over is what immunity was granted and then secondary what effect it has on State court. So, what I'm trying to get from this man, you see, he says, and I don't think Mr. Beckner would mind, at least stated on the record because he's been very cooperative with me. He told me that he could not under the federal ruling, appear here and testify today. I asked him. And so, I think the best witness that I'm going to -- if those rules are correct and he can't appear to testify, then, and I honor that. They've got their job and I've got mine. We are the state court. So, the best evidence apparently that I'm going to have is what that immunity was, is this letter and in the expansion, at least counsel claimed was made. So, my question simply

[Tr. 72]

is this, if they claim there's more immunity granted to him than it contained in that letter. That's my question.

THE COURT: Overrule the objection.

BY MR. SINQUEFIELD:

A. Mr. Sinquefield, as Mr. Olsen just said, this letter, I think pursuant to federal rules sent to Mr. McPherson to put him on notice where he could into these questions. Now, he chose not to question Mr. Day about his immunity when Mr. Day testified. Mr. Olsen discussed with Mr. Beckner,

did Mr. Day have total immunity and Mr. Olsen is a federal expert and that's the reason I retained him as co-counsel. He discussed with Mr. Beckner, we want total and complete, that is derivative use, the whole shamile. I don't understand all the differences in it and I don't claim to but when Mr. Mike Hill came to us prior to Mr. Day's testimony, he merely stated, Mr. Olsen, we have agreed and grant Earl Day immunity. That was the only immunity that was ever directed through counsel in Mr. Day's matter. This was directed to Mr. McPherson and I don't know what requirements, how much they have to describe, delineate, expand; I don't what requirements they have. I understand this is your automatic discovery procedures that are employed in federal court.

Q. Let me show you document, I'm going to mark it S-2. This is a document, the form of granting immunity to Mr. Jack Menzie. Motion for immunity filed in federal

[Tr. 73]

court, signed, Don Beckner or Mike Hill, an order of immunity signed E. Gordon West, United States District Judge, and an authority by Philip B. Heymann, Assistant Attorney General, Criminal Division, United States Department of Justice, approving the request for immunity under 18 United States Code, 6,003(b), and the other federal statute. As attorney for Earl Day, to your knowledge was any such motion and order and statutory grant of immunity given to Earl Day in federal court in connection with his testimony in the case against Gaston Gerald?

A. No, sir, and I asked Mr. Olsen the same question as to why there were two different procedures and he having at one time been senior prosecutor under two U.S. Attorneys. He said, of course, Mr. Menzie was in this from the beginning and I understood that Drew McInnis demanded this. The difference as I understand it is that the statutory grant of immunity is made, it has to be processed through the office of the Attorney General of the United States taking some considerable amount of time and paper work through the procedures filed and the type of immunity that Mr. Olsen requested and was granted was just as valid but it was not necessary as long as we had no

question and Mr. Beckner said he'd always put it in the record if we wanted him to. Mr. McPherson didn't put in it the record and that's the reason we called Mr. Beckner. So, as I understand it, the statutory grants the convenience of the oral or verbal or the letter type. This is not a letter type immunity here. This is your discovery procedures to Mr. McPherson. This is your statutory immunity which we did not ask for

[Tr. 74]

it because we didn't think it was necessary and until --

Q. Well, let me ask you this. Answer my question: To your knowledge, there was no statutory--

A. There was none requested by--

Q. --as to Earl Day?

A. I'm sure that there wasn't. There would be nothing in the record if that's what you're leading to I wouldn't think that there would be.

Q. Let me show you what I've marked as S-3, the copy of the certified--of the certified copy of the transcript of Jack Menzie. Question, this is by Mr. Beckner, says, Mr. Menzie, are you appearing before this jury in this trial today under a grant of immunity? Answer: Yes. Tell the jury what you understand is that that grant of immunity means. Answer: That I have to answer all questions asked me as truthfully as I can remem-

ber; and for that I will not beprosecuted for extortion. You understand that if you do not tell the truth today, you could be prosecuted for perjury; is that correct? Answer: Yes. In comparison of that statement by Mr. Beckner in comparison with the question of Mr. Earl Day against number one, to your knowledge there were no questions like that asked of Earl Day in the federal trial; is that correct?

A. I sat through Mr. Day's testimony and I'm sure the record properly reflects, Mr. Sinquefield, what was asked and how it was answered.

Q. To your knowledge, did you or any of the attorneys for Earl Day ever contact the District Attorney's office in East Baton Rouge or any of his assistants and asked them if they concurred or would go along with this grant

[Tr. 75]

of immunity for Earl Day as far as state's prosecution is concerned?

A. Mr. Sinquefield, the first connection we had with the District Attorney's Office and I mentioned--

Q. Would you answer the question and then you can explain?

A. Well, by explaining I think I can answer the question and the answer is no. The first contact that we had, I was on vacation that week and Mr. Olsen was out of two also from New

Orleans and on August 31st I was leaving for New Orleans and I was on vacation but the Friday afternoon as I recall and Mr. Day called me at the house right before my departure and said that he had been indicted and I got in touch with Mr. Bacot who said that Mr. Bourland had called him Friday afternoon and asked Mr. Bacot, my law partner, if Mr. Day wanted to, he would be invited to come back before the State Grand Jury and testify. Mr. Bacot, as I understand, replied back to Mr. Bourland that he could not contact Mr. Olsen. He made an effort and that I was on vacation and Mr. Bourland told him that would be no problem that they would hold it over til the next week and if Mr. Day wanted the opportunity to come and testify that would be fine and much to my surprise, he was indicted that afternoon. I never had any contact with the District Attorney's Office prior to that.

Q. Okay. My point is this, you testified prior to him testifying in the federal court, Mr. Mike Hill told you that he had immunity?

A. He told Mr. Olsen. I was present.

Q. Told Mr. Olsen? You were present? Prior to that time, to your knowledge, did you or any other attorney, representing

[Tr. 76]

Earl Day, had any of you called the District Attorney's Office or any of his assistants or investigator and ask them if the District Attorney concurred in this immunity as far as any State charges that might be derived from his testimony?

A. No, I'm sure we didn't.

Q. Okay.

A. I didn't; I'm speaking for myself.

MR. SINQUEFIELD: That's all.

THE COURT: Any questions?

MR. OLSEN: I have one or two.

[Tr. 77]

REDIRECT

BY MR. OLSEN:

Q. Mr. Forrest, is it not a fact that Mr Menzie, as opposed to Councilman Day, was directly involved in the substantive bribery charges brought in federal court?

A. Yes, he was carrying the money. I think his testimony what that he was an original conspirator and then he turned state's evidence and got the

grant of immunity. But I'll let the record speak for itself. I'm just --

Q. Have you ever had any reason to doubt the truthfulness or veracity of any statement made to you by the United States Attorney or his staff?

A. No, sir, and I hope I never would.

MR. OLSEN: I have no further questions.

MR. SINQUEFIELD: Judge, if by my questions, I insinuated that there was, I certainly didn't mean to. I'm simply trying to get at the facts.

THE COURT: Mr. Forrest, let me ask you this. To your knowledge have you or any counsel at all ever convey to the state District Attorney's office the fact that Mr. Earl Day had this immunity?

MR. FORREST: Your Honor, as I say, the day that I found

[Tr. 78]

out that we had any problem at all, he was indicted. We were going to be given til the next week. I was on vacation and Mr. Bacot couldn't reach me and couldn't reach Mr. Olsen and I came by the house. We were going to New Orleans with another couple on Friday afternoon and Mr., Day called me and said he had been indicted. When I talked to Mr. Bacot, he told me what happened. So, I had no reason or opportunity to convey anything to anyone because--

THE COURT: You're maintaining your client had use immunity, informal immunity?

MR. OLSEN: Judge, yes, not the kind that's formally applied for through the Attorney General--

THE COURT: But what the Federal Government calls informal immunity? Isn't that--

MR. OLSEN: Yes, Your Honor.

THE COURT: That's what you're maintaining, informal immunity?

MR. OLSEN: That's correct.

[Tr. 79]

THE COURT: You attended the Gerald trial with your client?

MR. FORREST: Not the whole trial, no sir, Mr. Olsen came and I had --

THE COURT: But you were there when --

MR. FORREST: When he came out of the witness room and Mr. Olsen met him and Mr. Hill came out and told Mr. Olsen that was about--

THE COURT: No, I'm just asking you if you attended --

MR. FORREST: Yes, sir. Not the whole trial.

THE COURT: Any more questions, gentlemen?

COUNSEL: No, sir.

MR. SINQUEFIELD: In connection with the witness's testimony, I would offer S-2 and S-3. I would offer the certified copies and ask to substitute.

THE COURT: Any objections?

MR. OLSEN: The original objection, Your Honor, to transcripts. No objection to the substitution and the document marked S-2, we object to that on

[Tr. 80]

the basis of relevancy, Your Honor. It has to do with Mr. Menzie, who was a co-conspirator with the principal prosecuted in Federal Court.

THE COURT: Overrule the objection. Let it be received into evidence. May I see the exhibits, please? All right. You have any more witnesses, counselor?

MR. OLSEN: Your Honor, we have no further witnesses.

MR. SINQUEFIELD: Your Honor, before -- I would ask. I think we agreed upon at least two stipulations. I'd ask defense if they would stipulate that other than general knowledge from the newspaper that the office of the District Attorney of East Baton Rouge Parish of state authorities did not participate or have no effort in the trial or the investigation or trial of Senator Gaston Gerald. Second, that the document marked D-1, to the best knowledge of all counsel here, was no introduced at the trial--at the trial of Senator Gaston Gerald and to our knowledge makes no part of the

[Tr. 81]

public record other than when it was introduced in this trial, I mean this hearing today. Can we stipulate to that?

MR. OLSEN: If it please the Court, with respect to the document identified as D-1, I can agree to that stipulation. We had no knowledge of it being introduced during the trial. However, with respect to the first matter, I'm unaware of exactly what the District Attorney Office said. It would--

MR. SINQUEFIELD: If I were called to the stand, I would testify that in fact the District Attorney's Office took no part in the trial, did not review the evidence. It was not a effort between the state and the federal government.

MR. OLSEN: Certainly, Your Honor. We would so stipulate.

MR. SINQUEFIELD: With that Judge, I have nothing further. I would ask that all the facts in this matter just to set the issues I feel before the Court. * * * (Arguments omitted.)